# PERSONS, GROUPS, AND THE STATE: SOME REFLECTIONS ON THE IMPLICATIONS OF CORPORATE PERSONALITY

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# Persons, Groups, and the State: Some Reflections on the Implications of Corporate Personality with Particular Reference to the Status of Trade Unions Under New Zealand Law

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C O N T E N T S

## INTRODUCTION

Law is both a reflection and a creator of the social milieu. The whole process of human interaction is predicated on the rights, obligations, powers and duties within a given system, which a human possesses, owes or is owed. The only constant factor within this milieu and *a fortiori* the legal system from which it is inseparable, is the fact of change. Consider the following quotation from Pollock and Maitland's *History of the English Law*:

> "Of the divers sorts and conditions of men our law of the thirteenth century has much to say; there are many classes of persons which must be regarded as legally constituted classes. Among laymen the time has indeed already come when men of one sort, free and lawful men (liberi et legales homines) can be treated as men of the common, the ordinary, we may perhaps say the normal sort, while men of all other sorts enjoy privileges or are subject to disabilities which can be called exceptional. The lay Englishman, free but not noble, who is of full age and who has forfeited none of his rights by crime or sin, is the law's typical man, typical person. But besides such men, there are within the secular order noble men and unfree men; then there are monks and nuns who are dead to the world, then there is the clergy constituting a separate "estate"; there are Jews and there are aliens; there are ex-communicates, outlaws and convicted felons who have lost some or all of their civil rights, also we may make here mention of infants of women, both married and unmarried, even though the condition be better discussed in connection with family later, and a word should perhaps be said of lunatics, idiots, and lepers. Lastly, there are "juristic persons" to be considered, for the law is beginning to know the corporation". 1

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1. Pollock F, Maitland F W, *The History of the English Law Vol. 1* (2nd ed, Cambridge University Press, Cambridge, 1898) 407.

In such a hierarchical structure it becomes immediately apparent that there were diverse statuses. Only a minority of the citizenry were, what Pollock and Maitland depicted as "free men". Most were under some umbrella of authority. Priests and nuns were not persons under the law but were under the spiritual umbrella of the Church. Women and children were under that of the father and husband. Some were in a marginal position with less than full rights, for example Jews.

What has happened over the centuries is that one by one these statuses and rights differences have been erased and changed with only marginal traces of the hierarchy left.

Manhood and eventually universal suffrage, equal pay [2] and so on have tended to negate differences between men, on the one hand, and between sexes on the other. Anti-discrimination legislation [3] is a means of enforcing the equal rights of women and minority groups. One group however, namely children, find themselves in the same status as their mediaeval counterparts, though even here there are elements of change, for example, the Minor's Contracts Act 1969.

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2. Equal Pay Act 1972.

3. E.g. Race Relations Act 1971, Human Rights Commission Act 1977.

But then there is that last sentence in the quotation, that "...the law is beginning to know the corporation". A definition of a "corporation" provided by Street [4] and approved in Abrahamse v Connocks Pension Fund [5] is:

> "[A] corporation is commonly styled a 'legal person' but the appellation 'person' is applicable to it only by analogy; and the analogy fails when it is thus clearly stated that this legal person is wanting in much that belongs to a natural person - that its course of existence is marked out from the birth; that it has been called into being for certain special purposes; that it has all the powers and capacities, and only those, which are expressly given it, or are absolutely requisite for the due carrying out of those purposes; and that all the obligations it affects to assume which do not arise from or out of the pursuit of such purposes, are null and void."

This and other definitions [6] provide only a cursory insight into the creature known as a "corporation". This paper will be involved in investigating what a corporation is, how the law treats it, and for what reasons, and what are some of the implications of such a treatment.

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4. The Doctrine of Ultra Vires (Sweet and Maxwell, London, 1930) 4.

5. [1963] 2 S.A. 76, 79.

6. Some other definitions of "corporation" are:

(i) Coke CJ in Tipling v Pexhall (1614) 2 Bulst 233, observed: "Touching corporations, these are invisible, immortal and have no soul; and therefore no subpoena lies against them, because they have no conscience or soul. A corporation is a body aggregate. None creates souls but God, the King creates them and therefore they have no souls; they cannot appear in person, but by attorney."

(ii) In 1691 by Holt CJ, as "ens civile, a corpus politicum an universitas, a jus habendi et agendi.

(iii) R v London Corporation (1692) 5 Kin 310, where it was said to be an artificial body composed of "divers constituent members like the human body and the ligaments of this body, political or artificial, are the franchises and liberties thereof which bind and unite all its members together, and the whole frame and essence of a corporation consists therein."

To analyse these general questions, the paper will focus on how the law has treated a very special type of corporation - the trade union. Chapter I of this paper will, however, first lay the conceptual groundwork for how a body is endowed with "corporate personality". Chapter II introduces, defines, and attempts to describe a model of the "trade union". Chapter III examines the various means by which the Trade Union has been treated in law, and Chapter IV examines reasons for such treatment. Chapter V is an attempt to synthesize the previous four chapters by creating a socio-juridical construct of the trade union in contemporary New Zealand. Chapter VI concludes, one may say, at the beginning. It looks at the individual: in some ways at the specific case of the individual trade unionist, but also in general terms of the society in which we live.

## CHAPTER I CORPORATE PERSONALITY

### PERSONS

A "social system" is usually typified by social scientists as a construct created and inhabited by persons. It is generally agreed, however, that such a classification is different from the aggregate of psyches of those who inhabit it. One can only turn attention to the fall of once-great civilizations, for example, the Incan civilization that capitulated to European conquest some 400 years ago. Here, a complex social system, based on a delicate structure linking geographically dispersed settlements, suddenly collapsed, leaving in its place a set of "primitive" villages with their inhabitants scraping out a mundane subsistence-level existence. What had changed was not the people but the social structure they inhabited.

But a social system is more than a mere man-made construct. It is a structure of which persons themselves are component parts. It is this reflexive character of the system that makes it critical to specify the elements upon which the system is constructed. So, what do we mean by "person"? [7]

There is no doubt that the word "person" is derived from the Latin "persona" and the Greek "proposon". Originally, the words meant a theatrical mask, familiar to students of Greek and Roman theatre as an integral device in the theatre

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7. See generally Hallis W. Corporate Personality (Oxford University Press, Oxford, 1930)

life of the two cultures. From this, the meaning of "role" was derived, and, through the passage of history, by what can be seen as an inevitable metaphor, the dramatic role became that which any "person" plays in the "drama of life". To this was added the terminology of Christian theology in which the word "person" had a special meaning as one of the three hypostases (substantiae) of the Divine Nature, and in which, further, the most important aspect of human existence was the membership in the Church, which itself was made a definite persona, mystically understood as a single and indivisible body. [8]

One of course can get lost in this "sea of semantic exercises". For instance, Radin [9] has argued that the word "persona", from a very early time, and quite separate from the "role" sense was used much as we use the word "person" in modern parlance. That is, referring to a flesh and blood human being. But then, if the immortal bard was correct and all the world <u>is</u> a stage and all the men and women in it <u>are</u> merely players, then the lawyer, the philosopher, and the linguist are as one seemingly entangled in contradictory positions.

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8. Webb <u>God and Personality</u> (Gifford Lectures 1918) 41. Quoted in Radin M. "The Endless Problem of Corporate Personality" (1932) 32 <u>Col. L.R.</u> 643, 646 n.

9. Radin M., ibid, 645-647.

The lawyer is, however, able to ignore such etymological inconclusiveness. He or she is aware that within any legal system, a basic unit must be provided before legal relationships can be devised which will serve the primary purpose of organizing the facts of the overlaying social system. The legal person is the union or entity adopted. As Korourek says:

> "The factual basis of social phenomena is legally organized through the device of personateness - centers of legal force or of attraction of legal force - having a capacity for claims, duties, powers, liabilities, or for some of these. Personateness being recognized, it remains a constant center of legal force or attraction." [10]

The legal person is the constant by reference to which claims, duties, powers are organized by means of general rules. In essence, the notion is grounded in abstraction: the intangibility of its reality; its being composed of a physical being through which it materializes its capacities and powers; but distinct from which it has a separate identity.

Pitfalls await those who indulge in "transcendental nonsense". [11] In failing to distinguish, on the one hand, "between roles played by certain legal terms with the consequent search for the 'essence' of a non-existent thing", and on the

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10. Jural Relations (2nd ed, Bobbs-Merrill, Indianapolis, 1928) 4.

11. Some of which are discussed in Cohen F.S. "Transcendental Nonsense and the Functional Approach" (1935) 35 COL L.R. 804.

other, "between the function of the term 'legal person' in the logic of the law and the 'things' to which the term is validly applied." [12] We will attempt to avoid such pitfalls as we indulge ourselves in the esoterica of legal personality.

PERSONALITY

It would be accepted that the law, as in the case of all human institutions, develops from the concrete to the abstract: that is to say, that it has laid down specific rules to produce, if possible, some coherent principle on which said rules are eventually subsumed and in accordance with which they may be modified or developed.

Legal personality provides a dilemma. Prima facie, one can accept a flesh and blood being as a unit capable of bearing rights and duties. However, the lawyer is aware of another type of "person", a sort of intangible construct that nevertheless exists within a legal system - "corporations". It has always been the case, ever since our neolithic ancestors banded together to sleep, eat and hunt that men have acted collectively toward a common goal. But, such actions, until the development of the corporate concept, were easily resolvable into the component natural persons of which they were composed; or were at least easily identified with a particular natural person.

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12. Webb op cit at pp. 7-8.

Lubasz [13] has convincingly demonstrated how the English common law by the late Year Book period (c1482) had evolved rudimentary principles of corporate personality in its treatment of the borough. The characteristics of that theory appear to have been:

(1) A concept of the borough corporation as somehow tripartite, mayor, sheriffs and commonalty each being a "member" of the whole;

(2) the virtual identification of corporate capacity with the name of the corporation;

(3) the view that the corporation was not so much an entity somehow distinct from and parallel to the political community as it was the community itself in its corporate capacity;

(4) the ascription to the mayor, as both head of the corporation and chief governor of the body politic, of a crucial, peculiar and distinct role; and

(5) the general tendency to allow legal concepts and rules to reflect, and thus to be adequate to, the political reality with which they were intended to deal.

Similarly, the Universities, from their very earliest days held property, used a common seal and appeared in court both as plaintiff and defendant. Not, however, till the

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13. "The Corporate Borough in the Common Law of the Late Year Book Period" (1964) 80 LQR 228. This paper was in part an answer to an earlier paper by Ke Chin Wang H. "The Corporate Entity Concept (or Fiction Theory) in the Year Book Period" (1942) 58 LQR, 498; (1943) 59 LQR 72.

thirteenth year of Elizabeth I were they formally incorporated by an Act of Parliament, for by that time it was well-established doctrine that no corporation could exist without an authorisation of the State. Indeed bodies presuming to act as corporations without the authority of the legislature (or the Crown) were "guilty of a contempt of the King by usurping his prerogative". This requirement of an act on the part of the State to confer independent juristic personality upon an association, has ostensibly virtually excluded the express creation of corporate entities by judicial decision. [14]

THEORIES OF PERSONALITY

At no time has English thought about the nature of legal personality assumed the posture of generally accepted doctrine. Given the traditional reluctance of English jurisprudence to investigate its own conceptual underpinnings this is of itself not surprising. The important fact is the fact that no system of law, including the English, recognizes the corporate character of every group of people, so that large numbers of "unincorporated associations" exist without specific legal personality. As will be seen in the absence of some statutory provision the unincorporated group cannot as such, incur contractual or tortious liability, or be injured, or hold property. The name of the group or association is used only as a "convenient means of referring in conversation

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14. Quo Warranto (1681-3) 8 St. Tr 1039; Duvergier v Fellows (1828) 5 Bing 248, 266.

to the persons composing the society." [15] Yet despite this non-existence in the eyes of the law it is true to say that neither practical lawyers nor legal theorists have been wholly able to ignore the phenomenon of group life. The so-called 'Realist' theory of corporate personality professed to find a solution by holding these factual entities to have moral personality distinct from that of the aggregate of members. The most oft-quoted encapsulation of the idea has been that of Dicey who said:

> "When a body of 20, or 2,000 or 200,000 men bind themselves together to act in a particular way for some common purpose they create a body which by no fiction of law but from the very nature of things differs from the individuals of whom it is constituted." 16

The most famous exponent of the theory was the German, Otto von Gierke [17] who postulated that the subject of rights need not be human beings, that every being which possesses a will and a life of its own may be the subject of rights, and that States, corporations, foundations are beings just as alive and just as capable of having a will as are human beings.

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15. Bloom v Nat. Fed. of Demobilised and Disabled Soldiers and Sailors (1918) 35 TLR 50, 51 per Warrington L.J.

16. "The Combination Laws as Illustrating the Relation between Law and Opinion in England during the Nineteenth Century" (1907) 17 Harv L.R. 511, 513.

17. Political Theories of the Middle Age (transl. F. W. Maitland) (Cambridge University Press, Cambridge, 1900). In his classic "Introduction", Maitland made Gierke's work familiar to the English public.

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> "universitas [or corporate body]...is a living organism and a real person, with body and members and a will of its own. Itself can will, itself can act...it is a group person, and its will is a group will." 18

Gierke pruned some of the excessive analogies with "organisms" [19] that characterized earlier Realist incarnations, but a will he certainly thinks is presupposed for being a legal person. In Gierke's view such groups had a status in law which was not derived from State recognition as such. An incorporating statute demands of a body "more than the mere fact of its birth, it demands also its legitimate birth." [20] Thus the statute does not create, it declares.

The source of corporate unity is, according to Gierke, not in terms of contracts between members but on the basis of a constitution (Verfassung). True, the original agreements between the members of the corporate body belong 'on one side of their being' to the law of contract. They are, however, at the same time elements of the creative act (elemente des schopferischen aktes) which calls into being the bearer of a general or social will (sozialer willenstrager). The individuals in giving up some of their freedom gain the status of the group of which they declare themselves members. Their

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18. Maitland ibid. xxvi.

19. This theory evolved in a period when the terminology of sociology was applied to politics and jurisprudence and the phenomena of the social sciences were interpreted in terms of the Darwinian struggle for existence and evolution. Unfortunately, there was a tendency to carry on an anthropomorphic organismic terminology to an extreme. See Pound R. "The Scope and Purpose of Sociological Jurisprudence" (1912) 23 Harv. L.R. 489, 495-400, 502-503.

20. Hallis op cit p. 142.

wills and acts become the group's will and acts:

> "[The group] is not a fictitious person, it is a Gesammptperson, and its will is a Gesammtwille; it is a group-person, and its will is a group will." 21

As Barker richly elaborated it was

> "the pulsation of a common purpose which surged, as it were from above, into the mind and behaviour of the members of any group" 22

and this effectiveness in action could only be secured by cloaking the group - national, local, regional or professional - with an aura of legality.

The Realist theory was enthusiastically adopted in the twentieth century by the French Institutionalists. For instance to Hauriou [23] the social group or institution was

> "an idea of an undertaking or of an enterprise which is realized and which persists juridically in a social environment; for the realization of this idea an authority is constituted which procures organs to itself; and in addition, among the rulers of the social group interested in the realization of the idea there are produced manifestations of communion directed by the organs of authority and regulated by procedural rules."

The phrase "persists juridically" implied for Hauriou, the fact that the determination by the State of the status of a group is of a declaratory and not constitutive nature.

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21. Maitland, op cit p. xxvi.

22. In his "Introduction" to Gierke O Natural Law and the Theory of Society 1500-1800 (trans E. Barker) (Cambridge University Press, Cambridge, 1934) lxi.

23. See Broderick A. "Hauriou's Institutional Theory: an Invitation to Common Law Jurisprudence" (1965) 4 Sol Q 281.

Hauriou does not contradict the obvious political and sociological fact that the State can deny this recognition by the exercise of crude power. Hauriou's suggestion - and this is his central tenet - is that if you are looking for objective criteria to guide the State and the courts, there is sociological force in recognizing a rationalised body as a legal person. And there is also a moral force pushing in this direction - a certain compulsion of equal justice. What is being described is a normative proposition: "Given such an organization, as I describe, it 'ought' to be recognized as a 'legal personality'."[24] Provided there are compelling public reasons which dictate contrariwise, an "institution" is objectively "entitled" to recognition as a legal personality. The basic legal problem according to Hauriou, is thus thrown into the sociological arena to identify whether an organised group bears the substance of rational organization.

The major effect of Institutionalist thought was the emphasis on the plurality and vitality of the groups making up the social system. They included in this list the family, church, trade unions, and the State. These groups had a certain life of their own, a life deriving, as it were, from the natural order of things. Around this way of life, they argued, there inevitably had to develop rules of procedure and action which were inherent in the purposes of the particular group.

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24. Idem.

It was the role of the law to legitimate these purposes by giving recognition to such rules.

Clearly, what is being proposed by Hauriou, and of Realists generally is, the exercise of a value judgment - be it by the State or the courts. They concede that ultimately it is these authoritative bodies that decide recognition or not of a corporate body but sociological data provides what law craves - an objective standard, to ensure "justice".

Of course, as Duff points out:

> "this leaves completely open the attitude which the legislature or the Courts may take up towards it. They may refuse it all rights and duties, exactly as most legal systems in the past have refused them to some human beings....[a Realist] need not deny the power of the State either to destroy a group and forbid it to meet, or to treat it as a creature whose acts, like an animal's can create rights and duties only for others, or to give it rights and duties differing from those of the human being in any respects that may be deemed socially expedient." [25]

The Realist theory is contrasted with two other theories which usually are treated as complementary, namely the Fiction and Concession Theories. According to the Fiction Theory, only human beings can be persons, and therefore the subject of rights. Corporations are not persons, but they are treated <u>as if</u> they were. In contrast to natural persons, who are considered capable of having 'natural' rights, corporations are endowed with this capacity by law. This theory has been

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25. "The Personality of an Idol" (1927) 3 <u>Camb. L.J.</u> 42, 48.

traced to Pope Innccent IV (1245) though it is doubtful if he accepted the full implications of the Fiction Theory as now understood. [26] It owes more to the work of von Savigny [27] and latterly in English jurisprudence tc that of Salmond. [28]

Its corollary, the "Concession" theory, has a different theoretical background to the Fiction theory, and lays down that the legal personality of a group can come into being only by concession of the State. It may be noted that the Concession theory is not an inevitable deduction from its "Fiction" cognate, for it can well be imagined that a corporation can be determined as fictitious in character, yet with no legitimating act of State. [29]

For our purposes, it will be assumed that the Fiction Theory leads as a matter of practicability to the notion of State imposition of corporate status. However, it must be noted that methodologically the Fiction theory is ultimately a philosophical theory that a corporate body is but a name,

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26. See Smith H.A. Law of Associations (Clarendon Press, Oxford, 1914) pp. 152-152.

27. "Jural Relations" (trans W. H. Rattigan), Savigny's System of Modern Roman Law Bk II (Wiley and Sons, 1884) pp 175 et seq.

28. Jurisprudence (7th ed) (Sweet and Maxwell, London, 1924) pp 339-342. The 7th edition was the last by Salmond himself.

29. For a discussion of the historical divergence between the theories see Dewey J "Historical Background to Corporate Legal Personality" (1935) 35 Yale LJ 654.

a thing of the intellect; the Concession theory although indifferent to the reality or otherwise of a corporate body; what it insists is that its legal power must be derived. [30] It is therefore an overtly political theory linked with the modern notion of the monistic state. [31]

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30. Some writers, notably Jhering, Brinz, Schwabe, and Hohfeld, have rejected all the foregoing views. They argue that the "subject of rights" in cases of corporate ownership of property is simply the natural persons who compose the entity. They concur with advocates of the Fiction Theory in maintaining that the personality of a corporation, or even its existence as an entity, is a pure fiction or metaphor; but they maintain that the fictitious personality is not 'created' by the State, because it does not exist. To them, a corporation is merely an abbreviated way of writing the names of the several members.

    But none of these writers have actually denied the phenomenon of group action or of group personality on the moral plane. Hohfeld, for instance, concedes that the action of individuals when acting as members of a corporation is different from their action as natural persons but "when all is said and done, a corporation is just an association of natural persons conducting business under legal forms, methods and procedure that are sui generis." All propositions which have corporation as their subject or object are ultimately reducible to singular propositions in terms of the legal relationships between natural persons, "...When we say that the so-called legal or juristic person has rights or that it has contracted, we mean nothing more than what must ultimately be explained by describing the capacities, powers, rights, privileges (or liberties) disabilities, duties and liabilities, etc, of the natural persons concerned as persons" - Cook (ed) Fundamental Legal Conceptions As Applied in Judicial Reasoning (Humprey Milford, London, 1923) pp 198-199.

    For a comprehensive overview of these theories of corporate personality see Pound R. Jurisprudence IV (West Publishing Co., St Paul, 1959) 191-261; 384-405.

31. The conception of a sovereign power was unknown to classical antiquity; even in the Roman idea of imperium it is only embryonically contained. Similarly the Middle Ages, marked by the battles between church and State, had no notion of the monistic conception. It was only till the writings of Bodin, Hobbes, Hegel, and Austin began to appear, outlining the pattern of domination reflecting co-ordinated, unified, supreme power controlled by a definite person or group of persons, that a theory of the monistic State took form.

Such a state possesses (or should possess) a single source of authority that is theoretically comprehensive and unlimited in its power. This unitary and absolute power is "Sovereignty".

THE STATE

In its simplest and most typical form this sovereignty is exercised by a single instrument and flows from a single person, as in a monarchial state in which the will of one ruler is supreme. But it may also take the form of democracies and federal states where the exercise of sovereignty is more or less divided between different instruments, in so far as the source of sovereign power itself is still regarded as residing in the body politic acting through the "General Will". In some countries this is embodied in a written constitution.

New Zealand as an heir to the legal history of Great Britain is a monistic state. During the last decades of the seventeenth century, the judicial powers of the judge were brought under the complete rule of the British Parliament. All judges acknowledged the binding force of all parliamentary Acts, while Parliament was sufficiently powerful to coerce any recalcitrant court into submission. With the rise of the cabinet form of government, the supremacy of the legislative function over the executive function was also assumed. In this way the British Parliament became the supreme law making

organ of the kingdom the central seat of all political authority, from which all other powers are derived. As Blackstone put it: "[W]hat the Parliament doth, no authority on earth can undo." [32] The tendency of group action to rival the political power of the State was counteracted by treating all organizations as "configurations" and conspiracies "except that as they derived all their powers from an express grant of a supreme power."

It was against such a state that Gierke, Figgis, [33] Laski [34] and others raised their voice of protest. In the first place they rejected any idea of a moral sovereign. There is no person or body of persons within a country whose commands, whatever the content, are absolutely binding on the citizenry. Laski denied that the State as such, had any prima facie claim to obedience, accepting the idea of Duguit [35] that the State is distinguished from other groups simply by possession of a greater degree of force. A law is morally obliging

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32. Commentaries on the Laws of England (13 ed., P. Byrne, Dublin, 1796) 163.

33. Churches in the Modern State (2nd ed, Longmans , Green and Co. London 1913).

34. Laski's literary output was prodigious, though during his long career he resiled from many of his previously-held views. For a representation of two of these periods see "The Personality of Associations" (1915-1915) 29 Harv LR 404, and The State in Theory and Practice (Allen and Unwin, London, 1935). For a general biographical sketch of the man and his ideas see Zylstra B. From Pluralism to Collectivism; the Development of Harold Laski's Political Thought (Van Gorcam, Assen, 1968).

35. Duguit L Law in the Modern State (Laski F. and H. J. transl) (Allen and Unwin, London, 1921)

according to its content rather than according to who issues it. It was for the individual who, when faced by a particular situation, to decide his course of actions and for any decision made, moral responsibility lay squarely on his shoulders.

Most English Realists also rejected the notion of a political sovereign - that is, a person or body of persons whose commands are actually obeyed in all circumstances. The State may be the body which possesses most of the instruments of physical force, but there are things in every country which the State is powerless to prevent or to impose. As A. D. Lindsay put it:

> "Whenever, therefore, men's loyalty to a non-political association, a class, or a church, or a trade union is greater than their loyalty to the State, the State's power over the trade unions or churches or classes within it is thereby diminished." [36]

This strain of thought has been termed "Political Pluralism" and contains within its parameters a wide spectrum of shades and nuances; from a laissez-faire model mirroring those social and economic theories that suggest that the optimum public good will flow from each individual and interest group within society pursuing its own goals as rigorously as possible[37]

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36. Quoted in Pollock F. History of the Modern Science of Politics (MacMillan, London, 1898) 81.

37. Wright Mills C. The Power Elite (Oxford University Press, Galaxy edition, New York 1959). Termed 'negative liberalism' by Nicholls D in The Pluralist State (MacMillan, London, 1965) 3.

through to a more egalitarian strand that believes the State should both protect the individual from coercion by the group and also create a balance of power between competing groups.

Note however, that while pluralism involved an attack on the sovereignty of the State, it did not necessarily attack the State as such. According to Figgis the State is a collection of groups forming a single political entity, rather than a collection of individuals. These individuals are seen as belonging to the State through their membership of other groups. Figgis also referred to the State in terms of the formal organs of government by which this collectivity acts as a single entity. The State for Figgis is only bound together by a civil or political bond, and existed in order to maintain a situation of order in which its member groups are enabled to pursue such purposes.

It is therefore an essential job of the State to regulate and to control the activities of groups in such a way that they are able to achieve those ends for which they exist. In order to resolve conflicts between groups, a framework of legal institutions was necessary. The State exists to control and limit within the bounds of justice, the activities of all minor associations whatsoever. The point at issue is not whether churches can do anything they choose, but whether human law is to regard them as having inherent powers, rights, and wills of their own - in a word, a "personality".

If they have, their activity might be restrained in so far as it interferes with others - thus, they would not be allowed to persecute, and ought not to be allowed.

Figgis was particularly concerned that the law should recognize the right of the group to grow and to modify its original purpose. The group whether formally incorporated or not, should be able to determine what its purposes, directions, motiviations and so on were; it should not be tied down for instance by rigorous interpretations of the concept of ultra vires, or by narrow constructions of trust deeds. Such fundamental issues were raised in the Free Church of Scotland [38] case when the House of Lords decided that the proposal of the constituted authority of this church, backed by the vast majority of its members, to combine with the United Presbyterian Church was against the strict interpretation of the trust deeds. All the property of the Free Church was to go to a small section of the Church which refused to join with the United Presbyterians. The dead hand of the law "fell with a resounding slap upon the living body"[39] and a special Act of Parliament was passed in order to rectify the "absurd" consequences of the decision.

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38. Free Church of Scotland v Overtoun. [1904] A.C. 515.

39. Maitland F Collected Papers (Fisher H. A. L. ed) (Cambridge University Press, Cambridge, 1911) 319.

A problem that troubled Figgis however stems from the argument that if the State is ultimately concerned about the conscience and character of its citizens, then would it not be justified in suppressing or at least interferring with groups that denigrated the character of its members? He would have to admit the possibility of State intervention but would probably insist that such intervention will often fail to achieve the desired objective.

## THE FICTION-CONCESSION THEORIES ASCENDANT

Such ideas have great appeal to those imbued with an individualist philosophy: one that invokes the dignity of man and the liberalist notion of free association - it is the claim that the Fiction theory is incompatible with such tenets.

But even greater appeal is engendered by the perceived theoretical inadequacies of the Fiction Theory. For instance Gierke held, and quite rightly, that law can protect the rights of natural persons only, and that the object of its protection is always ultimately a social reality. But he makes the mistake of overlooking that if this is a necessary assumption for the purposes of juridical organization of the social system, it does not necessarily prove their real existence as social facts. In the words of Hallis

> "[he] assumed that what has a substantial reality in the eyes of the law is also real from the point of view of philosophy; that is, from the point of view of what is concrete, living reality. He has substituted an abstraction for a concrete reality." 40

Gierke's dogmatism arose because it was believed that to apply the term "fictitious" meant to deny that something existed. So, if a corporation is a fiction, then all forms of legal categorization such as contract have no existence in reality.

The fundamental error was to be persuaded that "fiction" entails "falsity". This is understandable when even proponents of the Fiction Theory are unsure of the word "fiction's" etymological derivation. It has generally assumed to derive from the Latin "fingere" which means to "invent" or "create" or "fashion", yet in Roman law as in English the term fiction as applied to a corporate entity assumed that something was not what it was described as. In this sense, the corporate entity was to be treated as a person though this was unashamedly make-believe. The same confusion was also attributed to the appellation "artificial".

However, this present century has thrown up a convincing array of theoretical objections to the previous analysis.

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40. Op cit pp. 162-163.

Writers such as Vaihinger, [41] Fuller [42], and de Tourtoulon[43] have weaved the notion of "fiction" into an abstract algebra of law. "Fictions" for them, are nothing more than hypothetical reasoning; a device which "forces upon our attention the relation between theory and fact, between concept and reality, and reminds us of the complexity of that relation." They are the "white lies" of the law, but with the important corollary that the fiction is not intended to deceive. Nor are they the opposite of reality:

> "[E]very theoretic fiction may be resolved into a series of concrete dispositions of which it is simply the clothing." 44

Of course a "fiction" can represent a state propounded with a complete or at least a partial consciousness of its falsity, and thus give credence to the Realist objections. However, this is not a true criticism of the Fiction Theory so much as distinguishing good law from bad. Thus Gray [45] assumed only a being with a will could have legal rights and so was forced to record corporate personality as a fiction derived to escape this premise. But this ignores the fact that the subjective existence of the corporation lies in the existent

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41. The Philosophy of "As If" (Ogden CK transl) (Routledge and Kegan Paul, London, 1924).

42. Legal Fictions (Stanford University Press, Stanford, Calif., 1967).

43. Philosophy in the Development of the Law (McRead M. transl) (Augustus Kelly, New York, 1969) pp. 385-402.

44. Fuller, op cit ix.

45. "Some Definitions and Questions in Jurisprudence" (1892) 6 Harv LR 21. But note Cohen's warning: "Theoretically we may be free to decide to use a word like personality in any sense we choose, but practically we must recognise that intellectual resolution cannot rob words of their old flavour or of the penumbra of meanings which they carry along with them in ordinary intercourse"- "Community Ghosts and Other Perils in Social Philosophy" (1919) 16 Jo. of. Phil. 673.

collectivity. Bulow [46], in an article on procedural fictions of German law said that a proper understanding of fictions ought to bring us to realize

> "that the incorporeal centre of legal interests which we designate as a 'legal person' possesses a substantiality which cannot, and need not, be created for it, by an act of imagination. This substantiality, however, need not include such supernatural elements as a common will."

The use of the fiction though is even more fundamental than that for it gives to the very core of the legal process - of how law develops. The common law grows by analogy from previously decided legal situations. It builds on facts and nuances till a corpus of law is seen as embracing certain social phenomena until substance is derived in ultimate reference to the Law. For instance, take Fuller's analogy with the physical sciences. We say sugar (the thing) has the properties of being sweet, white, soluble and so on. But when we come to define the thing (sugar) we simply enumerate its most important properties. The properties are the things, yet we regard them as appurtenances to the thing, as if the thing was something more than the sum total of its properties.

Now by the same reasoning, how do we define a "human being"? In fact, any definition is inadequate - human beings do not form a unique or homogenous class. For instance, they may be

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46. "Civilprozessualische Fiktionen und Wahrheiten" (1879) 62 Archiv f. d. civilistische Praxis 1, 10. Dealt with in Fuller, op cit, 13 n

male or female, black or white (or any shade in between) young or old, and so on. In other words we find it impossible to know what a person is. However, we can formulate a definition according to the analytical needs facing us. Therefore, economic science has devised a notion of "rational economic man" as a construct to aid understanding in that particular science. Yet ethically such a construct is nonsensical. Similarly, the construct $\sqrt{-1}$ has no existence outside the realms of mathematical praxis where, for certain purposes, it provides a service.

And so it is in law, as in other sciences that the metaphorical element plays its role. In legal theory a person is considered to be any unit upon which the law attributes legal rights and duties. Any unit which is not so endowed is not treated in law as a "person" even though it may be a natural human being - indeed in Roman Law, slaves were not considered persons. Human beings may not even be in existence - for instance unborn generations have rights attributed to them through the law of trusts. They may not even have any connection to biological humanity, as when the Privy Council held that according to Hindu Law, an idol had personality.[47] The same holds true for a corporate person. There is the common link of legal recognition running through all classes of "persons"; yet this does not necessarily mean

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47. Pramatha Nath Mullick v Pradyunna Kumar Mullick (1925) LR 52, Ind. App. 245; 87 Ind. Cas. 205. See Note on case by Duff, supra footnote 25.

that all rights and duties are equivalent for all categories. Moreover, legal rights and duties, by definition may exist even if it appears nonsensical to the observer; a corpse has certain rights, inter alia, looking after its remains, the rights to have its testamentary wishes observed, and so for these certain circumstances a biologically dead person is still a "person" in the legal sense. Thus, there is no methodological objection in saying that for "some purposes" a corporate person may exist whilst in others it has ceased to exist. [48]

ENTIFICATION

Law is not static. Like nature it abhors a vacuum. It is only to be expected that as new fact situations arise, and new relationships are explored that a process of "entification" may occur. In fact it is a natural process and one in which the growth and richness of the law is ensured.

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48. "I can't believe that" said Alice.
"Can't you?" the Queen said, in a pitying tone. "Try again; draw a long line and shut your eyes."
Alice laughed, 'there's no use trying", she said, "one can't believe impossible things".
"I dare say you haven't had much practice," said the Queen, "When I was your age I always did it for half an hour a day. Why, sometimes I've believed as many as six impossible things before breakfast." - Lewis Carroll Through the Looking Glass (Oxford University Press, London, 1971) 177. Lawyers, by virtue of their trade will accept belief in devices which "[c]ognitively worthless,...may nevertheless be very efficient as devices of norm-derivation, having a faculty of normative expansion or irradiation providing or prompting answers where the law otherwise might be silent or incomplete. They may be, in certain cultural situations, the shortest and easiest ways of representing a great number and complexity of detailed provisions". Tammelo I. mimeographed letter of 8/10/63 (distributed by the Australian Society of Legal Philosophy quoted in Stone J Legal System and Lawyers Reasoning (Stevens & Sons, London, 1964) 49 n

A "thing" may have rights and duties added onto by process of law to achieve a specific legal or social goal. As Savigny described the process:

> "If a new juridical form is produced, it is as one connected with a previous form and thus shares in its improvement and development." [49]

It is here that we reach a crucial point in the transmuting process. The law may construct a thing and attribute to it properties. But the fiction - the thing must drop out of the final reckoning. We must not suppose that the thing is greater than the sum total of its properties. As Vaihinger terms it "the correction of a previous intentional error", is for example to extract from "person" all those attributes not legally appropriate to the "corporate" person. If not, the legal construct is contaminated by the process of metaphor , and leaves it prone to reification by which is meant the existence of a legal concept even when all its legal rights and duties are taken away. The Fiction theory is founded really on analogy and as such is a device to fill a vacuum in the law by the shortest and easiest way. It can be thus seen as simply an abbreviatory device. As Wolf describes it:[50]

> "An author who has written five volumes on the law of physical persons and then wishes to discuss legal persons, need not write another five volumes - or rather four, as he would in any case be omitting marriage, divorce and parents and children - but he need only write a single sentence saying; all I have said about human beings applies by way of analogy to the following entities etc."

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49. Vom Beruf unserer Zeit fur Gesetzgebung und Rechtswissenschaft (2nd ed, 1828) pp 34. Quoted in Fuller op cit 59.

50. "On the Nature of Legal Persons" (1938) 54 LQR 494.

This "crutch of thinking" is then discarded when its purpose has been fulfilled.

Proponents of the Fiction and Realist theories frequently clash because they fail to appreciate that they are dealing on two different analytical planes; the former being a methodological approach, whilst the latter has a more metaphysical function.

Even Hohfeld [51] does not expressly discount the suggestion that "group personality" may exist as a fact, but his theory is not phrased in terms of phenomenological description but rather in terms of legal relations. In legal discourse the use of a group name is a convenient label even though the entity it represents is a fact, indeed a fact which the law must recognize. But in law, it is an entity "that in the last analysis consists of nothing more than a name by which a complex can be dealt with in discourse." [52]

The moment we speak of a group as an entity having personality we invoke a metaphor borrowed from the language of individual behaviour and which as such may lead us to attribute inappropriate characteristics to the group. So, the postulation of a "group will" is a result of this thinking.

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51. Fundamental Legal Conceptions (Yale University Press, New Haven, 1923) pp 198

52. Radin M. "The Endless Problem of Corporate Personality" (1932) 32 Col. L. Rev. 643, 667.

But, if we can attribute legal responsibility to a group this does not constitute that a group has a "will". It is because the law permits certain activities, which by analogy can be likened to the behaviour of individuals that, in limited circumstances we can talk of a "group will". This does not purport to say anything about the nature of the entity but merely to indicate the role played by the term "person" in the logic of the law. [53]

THE TWO STEP TEST

Most legal concepts, and corporate (or legal) personality is a pertinent example, bears at least two aspects; one formal, concerned with the logic of law, and the other substantial and affected by variables such as politics, economics, morals, and history. Both aspects need to be examined, studied and understood before conclusions can be reached. Obviously, the lawyer will feel more at ease and will be more capable of answering the formal legal questions. That is his training. But, the law evolved to answer questions of politics, of inter-human relationships, of quaint philosophical dilemmas. For a lawyer to ignore such aspects would reduce him to an unquestioning mechanic, and the law would truly become merely words and phrases accumulated in books on dusty shelves.

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53. Hart HLA "Definition and Theory in Jurisprudence" (1954) 70 LQR 37.

The actual word "person" should drop out of all reckoning. Arguably it has been abandoned since 1833 when it was extended to "a Body Politic; Corporate or collegium, as well as an individual." [54] The work is now done by specific statutes and judicial bearing upon specific matters.

It follows that when one speaks of corporate personality there is a two-fold question that must be addressed. Firstly, one must identify a concession of personality. "Normally" says Barker "the regular process will be that of legislation, accompanied and applied by judicial interpretation." But the judge will not necessarily stop at an exact interpretation of the mere letter of existing law. He may recognize legal personality (at any rate when he is dealing with the matter of group personality) on the ground of analogy assigning personality to bodies which are in an analagous position to those already recognized under existing law.

The second limb which naturally follows, is to determine the quantum and personality so conferred. That is, what specifically are the rights, duties, obligations and powers of the "entity". The question involves some difficulty. Individuals may act as individuals within a group situation or otherwise. But their acts, and their rights, duties etc.,

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54. (1833) 3 & 4 WM IV C74. Its New Zealand descendant is found in S. 2 Acts Interpretation Act 1924.

only exist in relation to their legal status as individuals, unless they can be construed as within the corporate group purpose. If, however, a group of individuals acts outside the group's conceded rights and duties, this does not deny that such acts do not exist in law - they may; nor does it mean that such acts will have no real consequences - again, they may. It simply means that such acts are not within the contemplation of the corporate group personality. As in the first limb, legislative pronouncement is the main but not the only means of determining this question. Unless the legislative language is unambiguous and all-embracing, there is necessarily room for judicial interpretation so far as social policy allows.

These degrees of "corporateness" are separate from notions of the concession. As will be seen later the degrees possessed by various bodies may be little different from each other and, factually they are treated in the same way. Conceptually, such bodies however, are of different categories

CONCLUSION

It is important to remember, the State does not necessarily give life or birth to a corporation. Just as a Registrar of Births records the arrival of newly-borns the concession of personality means nothing more than the <u>legal</u> creation of a corporate entity. Such a process is no more essential to the

existence of the entity than the Registrar of Births is essential to the conception or birth of a child. In other words, an entity is no different in fact, five seconds after formal recognition, than five seconds before. It is the eyes of the law, however, that discern the difference between the creatures, and which attribute by its gaze different legal consequences.

But the mere fact of being treated as different in law cannot but help to alter the 'factual' personality of the new corporation. Thus, Spengler [56] said:

> "For every organism we know that the tempo, the form, and the duration of its life, and of each individual phase of its life, are determined by the characteristics of the species to which it belongs. No one would suppose, of a thousand-year oak tree, that the main phase of its development is now just about to begin."

This is strictly correct. But just as we may transplant the oak into new soil, introduce it to exotic nutrients and sunshine, graft on new branches, it may just be said that it is entering its main phase of development. At the least it is embarking on a <u>new</u> period in its growth or ultimately to its demise. It will never be the same again.

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56. (Trans) Quoted in Belloch B. <u>State and Society In a Developing World</u> (Watts, London, 1969) 25.

## CHAPTER II

## THE TRADE UNION

In the previous chapter a normative conceptual basis for the legal treatment of groups in society was laid. This paper will now consider how one particular group, commonly known as a "Trade Union", is treated by the New Zealand legal system. However, before we embark on this stage, it is strictly necessary both for the sake of clarity of definition as well as to be able to better appreciate the "law-state", to conceptualize the entity under study.

### DEFINITION

The term trade union is a generic one that encompasses three distinct categories:

(a) Craft Unions: Historically the oldest type of union, they organise workers in the same craft or trade, regardless of the industry. Examples are carpenters engineers, printers. These are skilled trades which require lengthy apprenticeships, and in the days before Polytechnics the committee of the union would test an applicant's craftsmanship before admitting him to membership. In this way standards were guaranteed to employers, and a "craft" tradition built upon and maintained.

(b) Industrial Unions: These aim to organize workers in an industry regardless of skill.

(c) General Unions: This type of organization covers workers regardless of skill or industry.

For purposes of simplicity this paper will not differentiate between the categories.

So the generic "trade union" has been variously described as:

> "a continuous association of wage-earners for the purpose of maintaining or improving the conditions of their working lives" 57

> "all organizations of employees - including those of salaried and professional workers, as well as those of manual wage earners - which are known to include among their functions that of negotiating with employers with the object of regulating conditions of employment." 58

> "...[a group comprised of] labouring people. Its purpose is to improve the social, economic or political lot of the individual through improving the position of the working group." 59

These statements define the entity in terms of its inherent objectives or purposes. These appear to conceive of the union as a two-fold entity. Firstly, it protects the

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57. Webb S. and B. History of Trade Unionism (New ed., Longmans Green and Co, London, 1911) 1

58. Ministry of Labour Gazette (UK) Nov 1952 p. 375.

59. Suffrin S. C. Unions in Emerging Societies (Syracuse University Press, New York, 1964) 7.

workers within an employment relationship by defending the socio-economic base from erosion and the individual worker from job insecurity and victimization. This objective Szakats describes as "defensive, passive, and political". [60] Secondly, there is the assertive body, that achieves a better living out of the steadily increasing real wealth available from technological and capital growth within the economy. Szakats dubs this the "acquisitive, active, and economic" [61] aspect of the union personality.

Such categorizations are incomplete and simplistic. For instance, protection can be achieved through active and aggressive means. Moreover, if we accept the aforementioned purposes as valid, the question is left open - why a trade union? It is possible for some other body, for example, a political party, to embrace, by extension, workers' needs.

This is perhaps part of a fundamental question of what makes a collection of persons a human "group". To investigate specific aspects of this question it is proposed to delineate a model of union development.

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60. Trade Unions and the Law (Sweet and Maxwell, Wellington, 1968) 10.

61. Idem.

PURE THEORY OF A TRADE UNION

(a) Assumptions

For reasons that will become obvious further on, it is necessary to lay down certain conditions in our scenario.

(a) The existence of a class of permanent workers sufficiently numerous and concentrated to combine in force.

(b) No overt interference by the State or by management to inhibit contact and association between workers.

(c) Wages which are sufficient and regular to ensure a surplus after normal expenditure.

(d) Existence of workers who have experience in administration, or sufficient ability to undertake such tasks.

(e) No previously constituted combinations of workers.

(b) Primary Groups

Carl Jung once observed that

> "[t]he great decisions of human life have as a rule far more to do with the instincts and other mysterious unconcious factors than with reasonableness." 62

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62. Modern Man in Search of a Soul (Harcourt Bruce, New York, 1980) 69.

A typical wage earner in our scenario works to maintain himself and his family in a relatively comfortable standard of living, occasionally indulging himself on 'luxuries' such as a car, or a television set, which he nevertheless perceives as social necessities. There are other needs to be satisfied, most important to

> "feel that as well as earning [his] bread in a factory [he is] somehow living as well, growing in [his] work, developing [his] character [his] mind". 63

Workers are eventually drawn together not only by environment and factory layout, but also by a social process where people with similar ideals, hopes, fears and aspirations cluster into associations. Such informal organizations are called "work groups", a genus of what Cooley termed "primary groups" characterized by "intimate face-to-face association and co-operation." They are primary in several senses but chiefly in that they are fundamental in forming the social nature and ideals of the individual. [64] It is the direct or indirect interaction of each member with every other members that marks out the primary group.

Such groups are common because they represent virtual though not altogether conscious attempts on the part of workers

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63. Lord Citrine, former General Secretary of the Trade Union Congress (UK) in interview reported in The Observer 17/9/61.

64. Honore AM "What is a Group" (1975) 61 Archiv fur Rechts und Sozialphilosophie 161.

to gratify root-needs, whilst at the same time serving an economic purpose. In fact the latter obscured the other functions of a primary group. It has only been relatively recently that the controlling power and other functions of the primary work group have been gradually understood. In a study of non-union workers in the U.S.A., Mathewson [65] discovered that restriction of output was widespread: in 105 enterprises embracing 39 industries. In the workers' eyes there were compelling economic reasons for informal work-group arrangements to restrict output; basically to avoid working oneself out of a job. All the same the researcher judged that these justifications were in part rationalizations, and that restriction had much more to do with maintaining the solidarity of the group rather than economic calculation.

The most famous investigation of shop floor organization was carried out by a team of Harvard research workers at the non-union Hawthorne plant of the Western Electric Company in Chicago during the late 1920s and early 1930s.

Part of the work was to observe a group of men in the "bank wiring room". These men had their own notion of a fair days work, lower than the firms "bogey", which they enforced by ridicule, mild physical violence, and ostracism. They

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65. Restriction of Output Among Unorganized Workers (Viking Press, New York, 1931).

protected themselves from outside interference by manipulating their bonus system. They were allowed considerable discretion in submitting claims for "daywork allowances" to compensate for delays in production. The researchers stated that

> "[t]he men had elaborated, spontaneously and quite unconsciously, an intricate social organization which cut across the formal organization laid down in the rules and policies of the company." 66

Such a work place culture provides the reality for a worker. It means, to an extent, suppressing one's personal thoughts in favour of what would be expected by the group. But such a decision, made by the individual worker, would be made with a view to his perceived benefits of such an association; primarily to avoid ostracism, but inherently as a means of benefit and social enrichment:

> "[T]he primary group in effect loosens the straitjacket in which the individual is placed by the factory organization. Seeing a worker in the round, accepting his quirks and shibboleths, the primary group in effect takes the formal rules and procedures and bends them to meet individual cases. It puts, in short, a protective shield around its individual members." 67

Little research has been done to test this hypothesis within the New Zealand context. However a recent study [68]

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66. Roethlisberger F.J, Dickson WJ Management and the Worker: An Account of a Research Programme Conducted by the Western Electric Co. Hawthorn Works, Chicago (Wiley, New York, 1964)

67. Wootton G. Workers, Unions and the State (Routledge and Kegan Paul, London, 1967) 65.

68. Kerr Inkson H and Inslow J "Waterfront Workers as Traditional Proletarians: A New Zealand Study" (1981) 17 ANZ Jo. of Sociology (1981) 10. The study was primarily designed to investigate whether New Zealand Waterfront workers followed the ideal type definition of the "traditional proletarian worker."

albeit in a different context may provide a few clues.

Consider the following results (given in percentage terms)

| | | Watersiders (n = 87) | Freezing Workers (n = 133) | Assemblers (n = 72) | Carpenters (n = 91) |
|---|---|---|---|---|---|
| Frequency of talking to workmates | 'A good deal' | 71 | 59 | 63 | 62 |
| | 'Now and then' | 28 | 30 | 36 | 35 |
| | 'Hardly at all' | 1 | 11 | 1 | 3 |
| Number of close friends working nearby | 2 | 82 | 52 | 42 | 31 |
| | 1 or 2 | 6 | 20 | 25 | 25 |
| | None | 13 | 20 | 33 | 44 |
| Level of off-work association with work-mates regarded as close friends | Visiting at home | 50 | 41 | 46 | 43 |
| | Arranged outings | 20 | 8 | 6 | 14 |
| | Semi-casual meetings | 20 | 34 | 23 | 27 |
| | Purely casual | 11 | 13 | 25 | 16 |
| | Other/don't know | 0 | 4 | 0 | 0 |

In a primary group, within a given period of time A (of a group of individuals A,B,C,D,E) will interact more often with B, C, D, E than he would with outsiders, and likewise B interacts more with A, C, D, E.[69] The results tabulated give no indication of interaction with outsiders, as a proportion of contacts, nor does it take into account environmental factors (e.g. noisy factories, widely spaced work areas, though these may be inferred from the nature of the work). In only the Freezing Worker category was there a significant degree of non-communication, though this was only eleven percent of the sample. Workmates who indicated having at least one close friend working nearby numbered from a high of eighty-eight percent for the Watersiders, to a low of fifty-six percent for the Carpenters. Semi-casual meetings to visiting at the home of these "close friends" ranged from ninety percent in the Watersiders case, to seventy-five percent for Assemblers. Thus, the results are indicative of close personal affiliation outside of merely work related interaction, between people in the same work environment.

(c) Secondary Groups

As discrete primary groups become aware of similar groups within their environment an ideology of "strength in

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69. Homans G The Human Group (Harcourt Brace, New York, 1951).

unity" evolves, and the primary group "dresses up in formal clothes" to become a "secondary group", an agglomeration with its cognate groups. Between the informal and formal probably lies a transitional stage in which quasi-formal leaders speak in the name of the group. Small local branches are established and finally a "trade union" is formed.

It may be noted that it is possible to have a direct translation of "workers with certain attitudes" into an external association without any intervening primary-group state. However, the process of secondary group formation is a simpler, more unstructured one than that for primary group conversions. Convergence of norms and values will occur later than those inherent in the growth of primary groups. The difference is one of degree and procedure, rather than of any substance.

(d) Thus, The Union

The nature of a union is profoundly affected by the nature of the work-group culture, which is itself shaped by processes both internal and external to the organization. Each work group is unique, governed by the particular environment in which it finds itself, with the relevance and importance of different levels of collective organization tending to fluctuate according to which goals are most immediately pressing.

It is the active rank and file in such work-groups which ensure a union's existence by assimilating a collective union ideology, perform unpaid services and uphold union norms and values (known colloquially as "union solidarity"). Maximum co-operation amongst the various work-groups, the "union in action" usually only occurs when the survival of one or more of the work-groups is threatened, by legal, economic or managerial attack.

Moreover, primary group norms are not subordinated to those of the secondary group. Harmonious relations within the union do not arise by some mysterious entropic process. A union consciousness is not formed by the totality of sentiments common to all group members but by the totality of the sentiments approved by them. For instance, a union ballot which results in an unanimous decision to 'down tools' is the result of the acts of will of the individuals in the union, it is not an act of the union itself. It is true to say that many of those would have been influenced by the speeches of others, by mass suggestion, and by the herd instinct. The union in action is thus, in reality, the action of mutually influenced individual wills.

Necessarily, the habits, rules both written and unwritten tend to redefine the individual attitudes of its members.

"Since attitudes are a central element in character", Wootton says, "the union might almost be said to make members in its own image." [70] But even Wootton admits the process is reciprocal: attitudes arise out of a workers needs, they cannot be handed to him on a platter.

All this, of course, is not readily apparent to the trade unionist. For a profound transformation has taken place, as sketched by Frank Tannenbaum. [71] The union becomes not simply a vehicle for mundane purposes; with its normative structure it rather becomes a 'symbolic universe'. The trade union represents an attempt, albeit unconscious, to recreate in itself a sort of pre-Industrial Revolution society in which the worker had, despite all else, a recognizable and accepted place, and in which his life had meaning because he shared with others a common code. The union itself embodies the old symbolic universe; it is a social and ethical system, not merely an economic one: it is concerned with the whole man; its ends are 'the good life'.

However, this conception is more complicated because a union operates on at least two moral levels. [72] The creation of a union does not destroy the informal structure from which it sprang: what happens is the superimposition of the formal

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70. Op cit p. 91
71. Philosophy of Labour (Knopf, New York, 1951).
72. Wootton, op cit p. 92.

upon the informal. Correspondingly, there may simultaneously exist two moral domains; a union is by no means a homogenous moral entity and for instance, when a strike occurs the moral justification may be on a plurality of planes - a struggle for power, or indignation both at management and their own union.

Both individual goals of members and of the union as an entity have to be maintained in some sort of harmonious relationship to each other. Psychologists such as Aronson [73] believe that all human interaction constitutes an influence situation. That is, in any relationship between people each is trying to influence the behaviour of some or all of the others by using many different methods and techniques, and each is subject to the influence attempts of others. If this is true, then the fact that a union operates at the moral levels will not rent it asunder. Rather, it is a natural process that will only lead to an unstable state if divergent motives and objects are of such a nature as to be mutually incompatible with the continued survival of the entity. In fact there may be an almost total lack of recognition that any such situation exists. Organizational Development analysis often reveals disparate groups in one organization operating in counter-productive ways while

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73. The Social Animal (2nd ed, Freeman, San Francisco, 1976).

implicitly believing that they are working to achieve the same ends. While this conflict is often inevitable and obviously reduces the efficiency with which an entity pursues its daily course, it does not necessarily in any way impair the entity as a functioning unit.

(e) Post-Transformation Development

Unions, like other large-scale organizations, are constrained by both internal and external sources to develop bureaucratic structures. In dealing with their members, unions must set up administrative systems with defined patterns of responsibility and authority. Subordinate administrators must operate within given rules for dealing with repetitive situations; apart from keeping basic records, handling workers' grievances, and other 'usual' union tasks, administrators also act as quasi-referral agencies in handling accident compensation matters for instance.

The extent of bureaucratic centralization is also influenced by the extent of centralization in the structure of outside groups with which the union must deal. Lipset[74] suggests that a union which must have face to face dealings with a giant corporation must set up an authority structure paralleling that of the corporation.

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74. The Political Process in Trade Unions: A Theoretical Statement" in Berger M. Abert Page CA (eds) Freedom and Control in Modern Society (Octagon Books, New York, 1961) 85.

As this bureaucratization develops, control of the union passes into a small cadre who, motivated by ideology, altruism, or career advancement, for all intents and purposes determine the policy and direction of the group. Although the work group culture may, at points of crisis enervate itself, apathy and disinterest permeate the union. Gradually, what Fuller [75] termed the "legal principle" tends to dominate the association where it is held together and enabled to function by formal rules of duty and entitlement. This shows itself in three ways: (1) A greater reliance on rules to define members' duties and entitlements, (2) a concordant shift in accountability based on tangible harms or benefits which flow from specific acts rather than on mere judgmental assessments of character and motive, and (3) the articulation of strict procedural requirements for distributing benefits and burdens.

When the bonds holding such an association together consist of such formal structural elements, members are given greater leeway to pursue individual aims. The union at this point, though actually having no interests that are not the interests of some or all of its members, does take on a character peculiar to itself as an entity distinct from its constituents. It may own property which is not simply an aggregation of individual properties; it may own funds which

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75. "Two Principles of Human Association" in Winston K. L.(ed) The Principles of Social Order: Selected Essays of Lon L. Fuller (Duke University Press, Durham N.C., 1981) 67

the members cannot at pleasure distribute among themselves; it possesses rights and obligations, powers and liabilities as a unity, not as a summation of individuals. It is in this sense, corresponding to its peculiar methods, that the union attains a corporate character.

The union's dealings, whether to its members or outside bodies, thus have palpable legal, social and economic consequences. It is at this stage that the body is regulated by and subject to the law of the land so far as applicable to its general circumstances, or as befitting its unique status.

CONCLUSION

The foregoing discussion is obviously a highly refined abstraction, heir to all the weaknesses that such analytical models are prone to. In summary, it emphasizes a sequential development from an informal body of persons through to agglomeration into a larger secondary group, through to a highly developed bureaucracy that is the quintessential union.

Of course, the stages of transformation are not so neatly as defined in this discussion. No attempt has, or can be made as to predict how long each stage should take. What is important, in the context of this paper is to consider the "pure union" and the union in the eyes of the law (presented in the next chapter); their comparability and the implications of such a comparison.

## CHAPTER III

## UNINCORPORATED ASSOCIATIONS; QUASI-CORPORATIONS; CORPORATIONS - MANIFESTATIONS OF THE "CORPORATE ENTITY"

### HISTORICAL BACKGROUND

To analyse propositions concerning the legal personality of trade unions we now turn to statute and common law, keeping in mind the two-stage theory propounded in Chapter I. It must be admitted however, that the first limb of that test, namely the "concession" has, at least in English legal history, not been crucial. Various associations have been admitted to the status of legal persons without the traditional royal charter, or by the reigns of Edward III and IV, an Act of Parliament. This was made possible by the principle of corporate capacity by prescription, by the doctrine of implied grant, and by recognition for certain purposes, notably the Mediaeval Church. Nevertheless it required the declaration of a court of law before implied incorporation could be affirmatively established.

Gradually however, the State perceived it to be in their best interests to assert some control over these bodies. The general attitude may be gleaned from the Attorney General, Sir Robert Sawyer in a 1682 case involving quo warranto

proceedings against the city of London. If proceedings of this nature could not be taken against corporations,

> "it were to set up independent commonwealths within the Kingdom and (this)...would certainly tend to the utter overthrow of the common law, and the Crown too, in which all sovereign power to do right both to itself and the subjects is only lodged by the common law of this realm." 76

This policy of control was aided by the insistence that the category of juristic persons was closed. Flexibility in the system, was provided by the use of a device, originally an invention of Lombardy - the trust. [77] Such a device never constituted a great threat to the State because, as Holdsworth points out,

> "the capacity for action of a group of men, who depend for their life upon a body of trustees acting under a trust deed which defines and sterotypes their powers, is for more limited, both for good and evil, than the capacity for action of an incorporate person." 78

With the passing of the Companies Acts [79] during the nineteenth century incorporation became a formal process. The necessary controls over corporations were effected not only by this general legislation but also by legislation relating to particular activities. It would seem that, if not before

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76. 8 St. 1039. Quoted in Holdsworth W.S. A History of English Law (Vol. 1x) (Methuen, London, 1926) 46.

77. Maitland F. W. Introduction to Gierke O. Political Theories of the Middle Ages, op cit. xxx.

78. Op cit. 148.

79. See Gower D. The Principles of Modern Company Law (4th ed. Stevens and Sons, London, 1979) Chapt. 2 for an historical analysis of the period.

this time, then certainly after it, the attribution of legal personality is dependent upon declaration by statute (or by an administrative body vested with power to declare) that a specific person or body of persons has legal personality. The courts have no such power except insofar as they have power to construe and interpret questions of legal personality.

ASPECTS OF CORPORATENESS

Thus, in contradistinction to the Realist dogma, the distinction between a corporate body and an unincorporated association is not necessarily derived from "the nature of things" but is merely dependent on the fact that the law has chosen to confer a different status on the bodies.

But how does the law do this - does it simply say that a "X is a legal person", or does it annex to a body of persons certain incidents that fulfill the accepted criteria of being a legal person? If so, what are they? Blackstone[80] stated five incidents:-

(1) Perpetual succession;

(2) Possession of a common seal;

(3) The power to make byelaws; binding on themselves unless contrary to the laws of the land;

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80. Commentaries I 475, Quoted in Lloyd D. Law Relating to Unincorporated Associations (Sweet and Maxwell, London, 1937) 15.

(4) The power to sue or be sued, to grant or receive by the corporate name, and to do all other acts as natural persons may;

(5) The power to purchase lands and hold them for the benefit of themselves and their successors.

If a body possesses all these attributes one can call it, according to Blackstone, a legal person. But what if only four, or only one of these attributes are possessed? Such questions pertain more to the second limb of the test, that is, the degree of corporateness of an entity. It has confounded the judiciary when the first stage, the actual concession, is unclear.

The case of the Trade Union provides a focus for these issues because in law, it can take on three different aspects. These can be demonstrated in the form of a continuum:

(I) Unincorporated Association: Not a legal entity. It has none of Blackstone's incidents (in law).

Low

"Corporateness"

(II) Quasi-Corporation: Able to hold property by trustees, to act by agents and to sue and be sued in its own name. Although not a corporation it is an entity separate from its members, implying perpetual succession.

High

(III) Corporation: Has all of Blackstone's incidents.

THE TRADE UNION IN LAW

(1) Unincorporated Association

English law has traditionally regarded the trade union as a voluntary association. In its purest form, a union falling into this category is not a legal entity. It can neither hold property nor contract in its own name. It cannot sue or be sued in its own name and it cannot commit, or be injured by torts, as a body. The name of the group or association is used only as a "convenient means of referring in conversation to the persons composing the society." [81] In order to determine the subject of legal rights and duties, the factual entity must be dissolved into its constituent parts. In sum, it has no existence separate from its members, its property belongs to its members and it can exist so long as there are members. The law only sees "them", not "it".

In essence, an unincorporated association is a common fund comprised of the following elements:

1. Contract An association may be regarded essentially as a contract between its members. The terms of the contract will be found in the rules of an association by which a member on entering agrees expressly or impliedly to be bound.

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81. Bloom v Nat. Fed. of Demobilised and Disabled Soldiers and Sailors (1918) 35 T.L.R., 50, 51 per Warrington L.J.

2. Agency Agents are persons whose acts operate to confer rights on the members of the society as against strangers, and rights upon strangers as against the members of the society. Their acts are in law the acts of the members.

3. Trusts Equitable ownership of the members' property is, in a sense, co-ownership for the purposes and subject to the rules of the society. The member has a right to participate in the benefits and control of the property as "social property".

4. Combination There must be an ascertainable moment of history when a number of persons combined or banded together to form the association. [82]

Underlying the unincorporated association is the essential notion of voluntariness or more particularly, the absence of any legal compulsion to join. Of course there may be strong extra-legal motivations to associate, for instance to mix with the "right people", or the passing-on of craft traditions, but there is no force of law to so command it.

Problems occur, however, as to when and to what extent ought the activities of unincorporated associations be subjected to judicial review. Generally, since many unincorporated

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82. See Conservative and Unionst Central Office v Burrell [1980] 3 All E.R. 42.

associations exist as factual entities, a degree of sophistication has been attained in terms of functions, activities and policies which are independent of those of individual members. Separate bank accounts may stand in their name. They may 'own' property, and have an independent income and expenditure. An outside person may 'contract' with them and be injured by 'their' servants and agents. Clearly, then, the law notwithstanding, groups of people who come together for cultural, artistic, social, religious or other purposes (other than gain) can and have acted as entities in the furtherance of their activities and have not been impeded by the lack of corporate personality.

Partnerships are a particular type of unincorporated association but it was found necessary to enable partners to incur unlimited liability for the acts of each partner, within limits, in contract and tort, contrary to the rule that those who take action against members of association cannot establish personal liability against those members who neither committed nor authorised the "act in law". [83] Nevertheless, the courts expressed a reluctance to intervene in the internal affairs of associations unless some right of a proprietary nature existed [84] and it is now accepted that partnerships, because of their peculiar business quality have adopted principles of law unique to themselves.

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83. S. 12 Partnership Act 1908.

84. R. v The Benchers of Lincoln's Inn (1825) 4 B & C 855, 107, E.R.

It is in the nature of our adversary system of law that when problems do arise, such as when a member of a group is aggrieved (e.g. being expelled), or if a contract entered into by the association is not performed, a dispute can only be resolved by recourse to established principles of law. One can only say that, in law, a voluntary unincorporated association has no existence, and that the most likely answer is that an individual member of a group who made the various arrangements, or caused a breach etc. is alone liable, and not the group as an entity.

In dealing with problems the English, Australian, and New Zealand courts have invariably used a conceptual approach. That is, should a person wish to sue an association, he is required by the Australian case of Cameron v Hogan [85] to demonstrate an existing legal relationship before the Courts will interfere. Several alternatives are open to the plaintiff.

(i) A Proprietary Interest

Originally, the only basis on which a plaintiff could frame his action was to show a right of property in the association. [86] This can be explained historically as a vestige of the limitation on the jurisdiction of the Court of

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85. (1934) 51 C.L.R. 358.

86. Holden A.C. "Judicial Control of Voluntary Associations" (1971) N.Z.U.L.R. 343

Equity in its power to grant injunctive relief though most common law jurisdictions (except Australia) have rejected this narrow approach. The problem with such an approach is

> "that a legal analysis which concerns itself with the discovery of a property relation as a precondition to adjudication cannot encompass the greater and more complex problem of the nature and importance of the particular association." 87

Australian case law has bordered on the fantastic in terms of demonstrating (or more correctly manufacturing) property interests. Few clear guidelines are established and often the particular injury sustained by a plaintiff is often neglected within the legal word games.

(ii) Contractual Rights

This has been the main context in which these cases have been argued. The law of contract provides a conceptual mould into which to fit the legal problems of associations. Where contracts are not apparent the courts "have sometimes gone out of their way to find one." 88

Associations are generally established on a consensual basis and provided that the members contemplate the creation of legal relations the rules of the association become the

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87. See O'Connor D. "Actions Against Voluntary Associations and the Legal System" (1977) 4 Monash L.R. 87, 93.

88. Holden, op cit, 347.

89. Rose and Frank Co. v J. R. Crompton and Bros. Ltd [1923] 2 K.B., 261.

terms of an enforceable contract. Supervision of contracts belongs to the court.

But do the members so intend? The conceptual fiction is stretched to its widest limits in, an unincorporated association with, say 1,000 members. If there is a contract between each member, and every other member the total contracts would number 499,500. Each time a new member joins the contracts undergo a series of implied novations to regulate the new relationships involved. [90]

It has other weaknesses. It is not easy to decide whom one should sue or whether there is privity of contract between the person injured and the body responsible for the injury. [91] Theoretically, the rules of natural justice or good faith can only be evoked if provision is made for them in the association's rules, or by implying terms. Difficulties may be also increased by the lack of a written constitution.

The most pressing problem is that contract does not cover an increasing number of cases. Nagle v Fielden [92] and Davis v Carem-Pole [93] were cases where there was no contract while in Faramus v Film Artistes Association [94] the plaintiff was trying to establish that he was entitled to make one.

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90. Chaffee Z. "Internal Affairs of Associations Not for Profit" (1930) 43 Harv L.R. 993, 1007.

91. Blackler v N.Z. Rugby Football League Inc. [1968] N.Z.L.R. 547.

92. [1966] 2 Q.B., 633.

93. [1956] 1 W.L.R. 833.

94. [1964] A.C. 925.

(iii) The Right to Work

In Lee v Showman's Guild of Great Britain [95] it was suggested that though the rights and reciprocal duties of members of voluntary associations are dependent on either property rights or contractual rights, the courts must always be prepared to intervene to protect the "right to work", which Lord Denning, in that case, considered to be just as, if not more important, than rights of property. Lord Denning has championed this idea in a couple of other cases [96], yet few other judges have supported his views.

(iv) Remedy Sought

Locus standi requirements may vary according to the remedy sought. Generally damages are only available for breach of contract or as a result of a tortious act. This makes it difficult for a litigant to recover damages against an association. If the plaintiff alleges a breach of contract, the court may construe the relationship between himself and the association as one not intended to create legal rights and responsibilities. [97]

With respect to the remedy of injunction, traditionally the courts will not entertain proceedings against an association

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95. [1952] 2 Q.B. 329.

96. Nagle v Fielden op cit, Edwards v S.O.G.A.T. [1971] Ch. 354, 377. See Hepple B. "A Right to Work?" (1981) 10 Ind. L.J. 65.

97. Abbot v Sullivan [1952] 1 K.B. 189.

unless a proprietary right or contractual basis for relief can be shown with respect to the latter conceptual basis. Four categories of case were set out in Lee v Showman's Guild of Great Britain (supra) where the courts would interfere with wrongful expulsion from an association:

(1) When action taken is contrary to natural justice.

(2) When a person, who has not condoned a departure from the rules, has been acted against contrary to the rules of the club.

(3) When the bona fides of the decision are in doubt.

(4) When the rules of the association have been misapplied albeit honestly.

With respect to declaratory relief sought against an association, a plaintiff need not show a cause of action based on a legal right like contractual or proprietary rights, yet he must show an "interest" in the action so as to justify his seeking relief. A discretion attached to the remedy is used to avoid involvement where it is judicially undesirable.

The common law difficulties are partially met by equity in the form of a Representative action [98]. But resort to this procedure is only available subject to compliance with a number of ill-defined conditions, and the law is obscure.

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98. R. 79 of the Code of Civil Procedure.

There are a number of difficulties associated with the action with the main one being related to the very nature of an unincorporated association in that membership is constantly changing [99] so that persons who were members at the time the cause of action arose may no longer be members, while new members may have joined. In tort a difficulty would arise upon finding that some of the members had voted against the action complained of as in these circumstances each defendant could raise a separate defense. Indeed, it is not markedly clear on whether or not the representative action is available at all in tort. Furthermore there is authority [100] that the action is not available when the sole remedy sought is damages.

The final avenue open is for the legislature to provide procedural devices which enable an unincorporated association to be sued. Generally such devices attach aspects of corporateness onto unincorporated associations with the common feature that judgment for damages is obtained against the common property of the association and can only be executed against that association. The fact that membership is not constant is irrelevant since the plaintiff does not have to establish the personal responsibility of the individual members.

A general example is provided by the Ohio Revised Code §1715.42 which provides, inter alia, that:

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99. Bonsor v Musicians Union [1956] A.C. 104.

100. Barker v Allanson [1937] 1 K.B. 463.

> "Such an association or society may sue or be sued or be answered unto, plead or be impleaded in any Court in this State" 101.

In the specific case of trade unions, consider the following two examples:

(a) Belgium

Belgian trade unions have, in general, neither formal legal status nor corporate capacity. This means that unions cannot be sued if they do not fulfill their "peace obligations" even when these are explicitly stated in the collective agreement, as laid down in Article 4 of the Act of 5 December 1968. Nor may the union sue the employer or the employers' association in its own name for failure to perform obligations under the collective agreement. It is for this reason that employers - seeking some guarantees as to the execution and administration of collective agreements - have directly linked the payment of "benefits" reserved for union members, to the faithful performance of the collective agreement and the maintenance of social peace during the lifetime of the agreement.

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101. Ohio Rev. Code Ann. p 1964. Such provisions however do not identify associations as legal entities and thus do not change the common law relationship between an unincorporated association and its individual members. For an overview of the Ohio provision see Burlington R. M. "Unincorporated Associations" (1976) 9 Akron L.R. 602.

However, pursuant to the Act of 5 December 1968 on collective agreements, representative unions - and the (representative) employers associations - can conclude collective agreements. These are legally enforceable. The same Act grants the representative organizations the capacity to sue and to be sued in all litigation arising from the application of the Act, and to defend their members' rights concluded by them. The individual union has standing to sue in two situations:

(1) Litigation arising from the application of the Act, and

(2) In order to defend their members' rights arising from the individual and collective normative stipulations in collective agreements. [102]

(b) Ontario and Saskatchewan

In Canada, the provinces of Ontario[103] and Saskatchewan [104] reacting to the common law situation and wishing to put trade unions in a position where they could use concerted conduct to bargain effectively, enacted legislation which defined trade unions as unincorporated associations. That is, they were still groups which could neither sue nor be sued as entities.

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102. See Blanpain R. "Belgium" in Blanpain R. (ed) International Encyclopaedia of Labour Law and Industrial Relations, Vol. II (Kluwer, Netherlands, 1979).

103. The Rights of Labour Act R.S.O. 1970, C. 416.

104. The Trade Union Act R.S.S. 1978, CT-17.

But, for the purposes of collective bargaining only, they are to be treated as entities, capable of enforcing collective agreements, enforcing arbitrators' awards, being subjected to prosecution, forcing the labour relations' board to carry out its functions etc. Thus, although trade unions are not entities for all purposes, they are for very significant ones.

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Such devices however, do not create collective legal entities. They are merely procedural means by which voluntary organizations who either cannot, or will not become incorporated, are able to give efficacy to their corporate character. It is a recognition that, as illustrated in the "Pure Theory of Unions", a union goes through various graduations - from an informal club-like group, to ultimately a sophisticated organization whose activities ought not be hampered by lack of legal personality whilst, at the same time, should not be able to cloak itself from any responsibility for its actions by relying on its non-existence in law.

(II) Quasi Corporation

In the years 1871 and 1876 the English Parliament passed, respectively, the Trade Union Act and Trade Union Amendment Act, with the avowed intention, broadly speaking, to protect trade union funds by enabling them to hold property for the furtherance of their objects, and to protect them

against fraudulent officials and third parties.[105] In 1878 New Zealand passed the substantially similar Trade Union Act, which in 1908 became the Trade Unions Act and remains as such on the statute books.

"Trade Union" is defined in the 1908 Act as:

> "any combination, whether temporary or permanent, for regulating the relations between workers and employers, or between workers and workers, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if this Act had not come into operation, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade." 106

Unions can, if they so wish, register under the Act though they are not thereby incorporated. Registered as well as unregistered unions are accorded a privilege not possessed by any other type of unincorporated association: the disabilities caused by the fact that most trade unions operate in unlawful restraint of trade (at common law) are removed[107]. Section 4 expressly provided that, although legalized, some of the most important agreements contained in the union rules are not legally enforceable.

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105. Rigby v Connol, (1880) 14 Ch. D, 482, 489-490 per Jessel M.R. As Mr George Jessel he took part in the Debates on the 1871 Bill - 204 Parl. Deb. (3rd Series) 2032 (14 Feb. 1871) and later became Solicitor-General. See also Wolfe v Mathews (1882) L.R. 21 Ch. D 194, 196 per Fry J.

106. S. 2(1). In the 1878 Act the archaic terms "master" and "workmen" were used.

107. Ss. 3-4. Trade Unions Act 1908.

A registry of trade unions is established by Section 8. This section closely followed section 6 of the Companies Act 1862 (U.K.) which provided that:

> "Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requisitions of this Act, form an incorporated company."

The first part of the section is repeated in the Trade Unions Act but the references to incorporation are omitted, and "memorandum of association" is replaced by "rules of the union". Although it might be suggested that similarity to registering under the Companies Act showed an intention to create similar legal results, the fact that section 6(1) forbids registration under the Companies Act (now) 1955, the Industrial and Provident Societies and Credit Unions Act 1982, and the Life Insurance Act 1961, the first two which incorporate the association, argues strongly against this suggestion. [108]

The Act provided that no union should be registered under a name identical with that of an existing registered

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108. Until 1936 if a company qualified under the definition of "trade union", it fell under this section, so that its incorporation under the Companies Act was void and that fact could be raised as a defence to an action based upon a contract that that company had entered into: Goldfinch and Co. v Rangitikei Sawmillers' Co-operative Association Ltd (1914) 33 N.Z.L.R. 666. Since the amendment in 1936, however this section applies only to trade unions which have registered under this Act. See Hickling M. "Trade Unions in Disguise" (1964) 27 M.L.R. 625.

union or so nearly resembling it as to be likely to deceive members of the public. [109] There is nothing in the Act to prevent an unregistered union from relying on its common law right to use its name to the exclusion even of a registered union.

As mentioned, one object of the Act was to enable the union to hold property. Section 9(1) says:

> "Any trade union registered under this Act may purchase or take on lease..."

Now, if a union was a legal entity there would be no apparent reason why the property should not be vested in the union as such. But Parliament resorted to the trust - as Maitland has so vividly described, this was the device to avoid the creation of a legal entity and for filling the gap in English legal theory caused by the absence of any general theory of associations. The property is vested in trustees "for the use and benefit of such trade union and the members thereof". [110] Said Lord Davey in Yorkshire Miners Association v Howden [111]

> "The association not being of an incorporated body, the appointment of trustees and the powers given to them are the machinery provided by the Act for carrying out its purposes."

The vesting of property in trustees suggests that there is no essential difference in the legal nature of registered and unregistered unions. As Lord Davey continued: "The beneficiaries are its members severally and collectively." [112]

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109. S.17(b) Trade Unions Act 1908.

110. S. 9(1) ibid.

111. [1905] A.C. 256, 269.

112. Idem.

The reference to the union in Section 10 implies simply a recognition of the factual entity, that is, the members collectively. Section 12 points in a similar direction. By that section trustees or an appointed officer of a registered union are thereby authorised to bring and defend actions relating to property. There is no ostensible reason why this procedure should be adopted if the registered union is a legal entity. As legal owners, the trustees of an unregistered union can sue and be sued in respect of the property. However, the unregistered union cannot sue or be sued through an officer who is not legal owner of the property.

Section 14 confers another special privilege on registered unions. Their officers and treasurers are rendered liable to account for moneys received by them and other property in their hands. The trustees are empowered to enforce the provisions of this section and in doing so they are entitled to "recover their full costs of suit, to be taxed as between attorney and client".

The rest of the 1908 Act (insofar as it is relevant) provides for the machinery of registration. Annual returns must be made to the Registrar of the assets, liabilities, receipts, and expenditures of the society.[113] It must

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113. S. 28 Trade Unions Act 1908.

possess rules which contain provision for certain matters. [114] It must have a registered office. [115]

It was not until some thirty years after the enactment of the 1871 English Act that the first civil action necessitating a decision on the effect of registration of a union under the Act was brought. Although it may be unreasonable for this first leading case The Taff Vale Railway Coy. v The Amalgamated Society of Railway Servants [116] to be seen as solving the question, subsequent cases have done little to clarify the uncertainties thrown up by it.

The facts of the case are disarmingly simple. Employees of the Taff Vale Railway Company were involved in a strike and the company brought an action in tort against the ASRS, a society registered under the Trade Union Acts 1871 and 1876 (U.K.), and against two trade union officials seeking injunctive relief and any further relief that the court might direct. The defendant society sought to have its name struck out on the ground that it was not being a corporation or an individual it was not a body capable of suing or being sued.

At first instance, Farwell J. agreed that a trade union was not a corporation, but examining the Acts of the 1871 and 1876 as a whole he was of the opinion that

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114. S. 18 ibid.

115. S. 19 ibid.

116. [1901] A.C. 426.

> "...although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents....The Legislature has legalized it, and it must be dealt with by the Courts according to the intention of the Legislature." 117

The real issue then, was one of whether the legislature had made legal an association capable of owning property and acting by agents but which could not incur tortious liability for its acts. Farwell J. reasoned:

> "It would require very clear and express words of enactment to induce me to hold that the Legislature had in fact legalised the existence of such irresponsible bodies with such wide capacity for evil..." 118

without them taking responsibility for their wrongs. He held that the society could be liable in tort for the acts of its agents and it was appropriate to bring the action against the society in its registered name. An interim injunction was granted against the society.

The Court of Appeal however, set aside Farwell J's orders considering that a trade union could not be sued in its registered name. The Taff Vale Railway Company appealed successfully to the House of Lords which held that the union

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117. Ibid. 429.

118. Ibid. 43.

could be made liable in tort in its own name.

The Lord Chancellor, Earl of Halsbury concurred with Farwell J's reasoning. The latter judge did not seem to view the union as being separate from its members - he referred to it as being "an association of individuals" [119] although not a corporation, and so it would appear that some sort of notional entity was envisaged. Such an approach was more explicitly accepted by Lord Lindley who saw trade unions as unincorporated societies which could be sued in their own names merely as a convenient way of proceeding against unions. He added the qualification that if an order for payment of money was sought, it could only be enforced against the union's property and to reach union property, the trustees must be sued. Lord Halsbury himself referred briefly to the registered union as the "thing" [120] which the legislature created.

Lord Brampton made the point explicitly that a registered union could be sued its name, not because it was a corporation, but that nevertheless as a full legal person it was a

> "newly created corporate body created by statute, distinct from the unincorporated trade union, consisting of many thousands of separate individuals, which no longer exists under any other name." 121

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119. Supra, footnote 118.
120. Ibid., 436.
121. Ibid., 442.

Thus, one indicia of incorporation, the ability to sue and be sued was conferred on the union. A further extension was made in Osborne v Amalgamated Society of Railway Servants [122] where Osborne who was secretary of a branch of the Amalgamated Society of Railway Servants and was almost certainly financed by other interests, brought an action against his union to enjoin payment of political contributions to the Labour Party, alleging that the rule authorizing such contributions was ultra vires and illegal. [123] The law Lords unanimously held that a registered union could not apply its funds to political objects. The majority reasoned that such expenditure was ultra vires the 1871 Act on the ground that the statutory definition of a trade union was limiting and restrictive, and that therefore a union was not competent to include among its objects one so wholly distinct from that definition, as a provision to secure and maintain parliamentary representation. Lord Atkinson described registered unions as "quasi-corporations" [124] which were more like the railway companies incorporated by statute earlier in the nineteenth century, than voluntary associations. So, a principle of company law, the doctrine of ultra vires was applied to a registered union.

In Kelly v N.A.T.S.O.P.A. [125], the plaintiff, Kelly, had been suspended and later expelled by a branch committee

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122. [1910] A.C. 87.

123. At this time English Ministers of Parliament were unpaid for their services.

124. Supra footnote 123, p. 102.

125. [1915] 84 L.J., 2236.

of the National Society of Operative Printers' Assistants. He found it almost impossible to obtain subsequent employment as most printing offices maintained a closed shop. After about a year, he sought a declaration by the court that the Act of expulsion was ultra vires and that therefore he was still a member of the society. In addition he claimed an injunction against the union officers and damages for unlawful expulsion.

Relief was granted in all respects but damages. The Court of Appeal unanimously held that the officers of the society were the agents of all the members, including the plaintiff and by suing the union the plaintiff was also suing himself. No limitation was sought to be placed on the relationship of agency and in view of the holding that the act of expulsion was ultra vires, it would seem that the agency was deemed to extend even to illegal acts.

In General and Municipal Workers v Gillian [126] it was held that a registered union could bring an action for defamation affecting its business and functioning as a union, upholding the opinion of the lower court that a registered union was a legal entity distinct from its membership. This view was endorsed by two Lords, MacDermott and Somervelle LJJ in Bonsor v Musicians Union [127] where a member of a registered

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126. [1945] 2 All E.R., 593.

127. [1956] A.C. 104.

union had been wrongly expelled and the question posed was whether the union as such could be sued by the member for damages for breach of the membership contract. Two of the other Lords, Morton and Porter LJJ, however, maintained that "the legislature has conferred on such unions some of the characteristics of a juridical person" but they did not go the length of saying that the effect of the relevant legislation had been to give those unions a new status amounting to a legal personality distinct from their membership.

Morton and Porter LJJ said, in effect, that the categories of legal personality known to the law were not closed. Although corporations and individuals must at one time have been the only bodies known to the law possessing an independent existence as legal entities, it was open to Parliament to create other categories for other purposes. This Parliament was taken to have done by the Trade Union Act.

Lord MacDermott with whom Lord Somervelle concurred took the opposite view. Carefully analysing the Act he reasoned that

> "when, as here, [Parliament] studiously avoids a familiar and appropriate method without purporting to adopt another in its stead, its intention to reach that result may well be open to doubt." 128

The fact that Parliament had not given the union power to hold property except by vesting it in trustees and could have

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128. Ibid., 144.

its registration cancelled upon its own request implied that Parliament did not intend it to be a legal person.

The fifth Lord, Lord Keith did not appear to throw full weight behind either of the two views. Apparently he regarded Bonsor's contract of membership as a contract between himself and the other members of the union and at the same time a contract with the trade union as representative of all its members. Thus, though he said that the "registered union remains a voluntary association" he thought it would not be wrong to call it a legal entity. His judgment has given rise to a great deal of judicial and academic heat. Professor Lloyd[129] has described Lord Keith's opinion to mean:

> "...a registered union is to be regarded both as a legal entity and as an unincorporated association in relation to the same transaction."

On the other hand it has been submitted that Lord Keith decisively supported Lords McDermott and Somervelle LJJ [130].

The practical result of Bonsor's case was that the plaintiff did receive damages for the unlawful expulsion, but at least three judges based that conclusion upon a ground which was independent of the question of whether the union had a legal personality.

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129. "Damages for Wrongful Expulsion From a Trade Union" (1955) 19 MLR 121.

130. Pittard M.J. "A Personality Crisis: The Trade Union Acts, State Registered Unions and their Legal Status" (1980) 6 Monash L.R. 49, 66.

Non Trade Union cases dealing with these issues are rare though as early as 1936, the New Zealand Supreme Court held that a body registered under the Friendly Societies Act 1908 (which had similar registration provisions to the Trade Union Act 1908) could be sued in its own name for the negligence of one of its employees. [131]

In Knight and Searle v Dove [132] it has held that a trustee savings bank could be sued in tort in its own name by virtue of the Trustee Savings Bank Acts 1954 to 1964. [133] Mocatta J. said that a right to sue or be sued might be conferred by statute either expressly or by implication or by the common law upon legal personae, including "quasi-corporations" constituted by acts of Parliament, such as the War Damage Commission. [134] He was inclined to imply quasi-corporate status into the relevant statute because the trustee savings banks were

> "institution[s] operating pursuant to statutes, owning considerable property and with numerous staff, possessing a protected name, and carrying on activities which from time to time would, in the nature of things, involve it, were it a natural person or a corporation expressly created by statute, in action for tort, whether as plaintiff or defendant." 135

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131. Fussell v Amos [1936] N.Z.L.R. 254.

132. [1964] 2 All E.R., 307.

133. Note that Trustee Savings Banks in New Zealand have corporate status.

134. Inland Revenue Commissioner v Bew Estates Ltd [1956] Ch. 407.

135. Supra, footnote 134, at 315.

More recently, in re Edis's Trust [136] it was found that the proceeds of sale of a freehold property belonged to a disbanded territorial regiment as a separate entity and not to its members, (at the time of disbandment), beneficially. The property had been held by trustees "as property belonging to [the unit] as the [commanding officer and his successor] shall or may from time to time in that capacity direct." The relevant legislation, section 25 of the Military Law Act 1863 (U.K.) stated that "all lands acquired by [a] corps or regiment vested in the unit's Commanding Officer [and his successors]", and Part V of the Act permitted a corps to acquire land for certain purposes subject to war office approval. Section 1(2) of the Military Act 1892 permitted corps to purchase land for military purposes. Goulding J. likened the volunteer corps to a registered Trade Union, saying that the land was given to the body simpliciter for the "purposes, defined by its objects and constitution".

However, the case which has caused the most interest has been Willis v Association of Universities of the British Commonwealth [137]. In that case the defendant, a corporation, was the landlord of a particular building. The corporation wished to recover certain premises from its tenant and the ground given in support of the notice to quit was that the landlord intended to occupy the premises to carry on business.

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136. [1972] 2 All E.R. 769.

137. [1964] 2 All E.R., 39.

The plaintiff alleged that, in fact, the premises were to be taken up by a branch of the landlord viz, the Universities Central Council on Admissions (U.C.C.A.) which was an unincorporated body, and that even if it could be argued that the premises were needed for this Council, "it" could not carry on business as it was an unincorporated association. Both arguments were rejected by Lord Denning. As to the substantive argument about status, he pointed out that the U.C.C.A. did important work, operated a bank account, employed staff and carried on other activities which were normally associated with a commercial enterprise.

Lord Denning relying on the notion that a "trade union (which is a body corporate) is a separate entity" [138] held that it would be right to recognize the council as a separate entity. However, he based his opinion on the trade union position by reference to Bonsor's case (supra), which, as has been shown, did not definitively establish that a trade union was a separate entity. More importantly, as Wedderburn [139] points out, Lord Denning's conclusion does not derive directly from any statutory source. The sole provision relied on by Lord Denning spoke of a "business" as "any activity carried on by a body of persons whether corporate or unincorporate." [140]

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138. Ibid. at p. 42.

139. "Corporate Personality and Social Policy: the Problem of the Quasi-Corporation" (1965) MLR 28.

140. S. 23(2) Landlord and Tenant Act 1954 (U.K.)

To that extent the Act does provide some ground for regarding the Council as a separate "body" for its purposes. In any case, the equivalent of section 2(1) of the Acts Interpretation Act 1924 would seem to include unincorporated bodies within the term "person". So the Act of 1954 scarcely compelled the court to regard the U.C.C.A. as a separate entity. Nevertheless, this aspect of Denning's reasoning has been followd in the Australian case of Bailey v Victorian Soccer Federation [141] where the Victoria Soccer Federation, an unincorporated association of sixty soccer clubs, was held to be an employer for the purposes of the Workers Compensation Act 1958 (Vict). The court recognized the common law difficulties in establishing an employment relationship between an individual and an unincorporated body, but held that the definition of "employer" as including "any body of persons corporate or unincorporate" clearly envisaged the existence of unincorporated associations which in their collective names could employ individuals. Gillard J. reasoned that it was intended that for the purposes of Workers' Compensation, that an unincorporated body had a juridical personality upon which could be imposed a liability to pay compensation for any injury suffered by an employee.

The salient feature of these two cases is that the courts did not rely on some form of special legislation that specifically granted certain bodies attributes of legal personality

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141. [1976] V.R. 13.

(such as ability to sue or be sued etc). Rather, it inferred a parliamentary intention to treat a body as a separate legal entity. In Bailey, Gillard J. said that the verbiage of the legislation facing him was more pointed that Willis in ascribing legal personality, and that for the purposes of the Act it was intended that an unincorporated body had a juridical personality upon which could be imposed a liability to pay compensation to an employee.

If this chronological survey of cases does not give a decisive answer to trade union status a further dilemma was created when in 1974, after a brief flirtation with corporate status (Industrial Relations Act 1971 (U.K.)) the Trade Union and Labour Relations Act (U.K.) (T.U.L.R.A.) stated, in abolishing the "corporate" regime, that a "trade union shall not be, or treated as if it were, a body corporate."[142] (emphasis added). Note the underlined language - it implies that the union is neither a corporation nor even a quasi-corporation. Yet upon further analysis it appears that the Act confers four attributes of corporateness:

(1) The union as such can make a contract [143]

(2) The property of a trade union is vested in trustees on trust for the union. [144]

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142. S. 2(1) and S.2(4) disembodies any that were bodies corporate.

143. S. 2(1)(a) Trade Union and Labour Relations Act 1974.

144. S. 2(1)(b), ibid.

(3) A trade union is given power to take or defend civil proceedings in its own name without the necessity of adopting a procedural device like that of a representative action. [145]

(4) Judgments are enforceable against the property of the union in the same way as if the union was a body corporate. [146] That is, it is the property of the union taken to the exclusion of the members own separate property.

The one case that has dealt with these provisions, E.E.T.P.U. v Times Newspapers Ltd [147] held that a trade union does not have a separate personality capable of being defamed. O'Connor J. when reviewing the aforementioned sections said [148]

> "[t]he fact that it can sue in tort does not mean that it can complain of the tort of libel. That is procedural. The tort of libel,....must be founded on possession of a personality which can be libelled and section 2(1) has removed that personality from trade unions."

The reasoning is orthodox though demonstrates how the judiciary have been mesmerized by the mere name "quasi-corporation". O'Connor J. [149] said that

> "Parliament has deprived trade unions of the necessary personality on which an action for defamation depends"

- this, with respect, is untrue. Parliament cannot deprive a

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147. [1980] 1 All. E.R. 1087.

148. Ibid., at p. 1104.

149. Idem.

body of something which it never had. Even those cases which take the quasi-corporation doctrine to its limits never claimed that a wholly separate legal entity was created. Lord Justice Pearson in Willis said that

> "[t]he council is in some respects a separate entity. When the members of the Council meet ...they are performing their own functions and not the functions of the landlords." 150

In Bonsor's case Lords Morton and Porter opined that the union was an entity to the extent recognized by the Trade Union Acts and remained a voluntary association for all other purposes. The implication is that quasi-corporate status is simply the result of judicial creativeness to open a door to forms of relief, which other actions are ill-suited to achieve. The bodies concerned still remained unincorporated associations - that they may have been given the appearance of separate personality from their individual members, was more a consequence of their factual as opposed to legal status. Parliament endowed bodies with certain procedural rights and duties to give efficacy to their factual existence. But that is all they are - section 2(1) of the T.U.L.R.A. was a potent reminder for the judiciary to keep their place.

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150. Ibid. at p. 43.

(III) Corporation

The Industrial Conciliation and Arbitration Act 1894 conferred corporate status on unions registering under the provisions of the Act. That Act has had several incarnations till its present form in the Industrial Relations Act 1973. Registration under the 1973 Act is open to

> "any society of persons lawfully associated for the purpose of protecting or furthering the interests of...workers engaged in any specific industry or related industries in New Zealand." 151

The word "society" is a neutral term, one reason being that it applies to employer as well as employee bodies which may register and obtain a corporate character. It is also arguable that the word is illustrative of a legislative intent to mark off registered bodies as occupying a special place under the ambit of the legislation.

By registering, the body becomes an "industrial union" (though this paper will continue to use the Trade Union nomenclature) and is "a body corporate by the registered name having perpetual succession and a common seal." [152]. Interestingly, as has been pointed out by Mathieson [153]

> "If the legislature had merely said that a registered industrial union was to have 'perpetual succession and a common seal' this would still have effected the incorporation of the union, for the attribute of perpetual succession (i.e. the retention of identity despite the continual changes in human membership) and the possession of a common seal are the clearest identifying marks of a corporation."

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151. S. 163(1).

152. S. 166 ibid.

153. Industrial Law in New Zealand (Sweet and Maxwell, Wellington

Perhaps then, the mere words "perpetual succession and common seal" act as the concession of personality. Note that Blackstone only saw these two features as incidents of a corporation, yet there is no logical reason why they should not act in a dual capacity if such is the common acceptance. [154]

The power to sue and be sued in its registered name is confered by section 190 and the power to purchase or lease land, lend or borrow money, or give guarantees is conferred by section 189. The opening words of subs (1) of this section are informative - "without further authority than this section...." implying that it is only through this Act that the State, and no other body confers incidents of corporateness.

In sum, the incorporated trade union is a body separate from that of its individual members. It is like a company registered under the Companies Act 1955, a legal person. [155]

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154. These words "perpetual succession and a common seal" were considered the "accepted formula for creating a corporation". Jumbunna Coal Mine etc v Victorian Coal Miners Association (1908) 6 C.L.R., 309, 336 per Griffith C.J. Note, however, that the formula "be a body corporate... and having perpetual succession and a common seal" describes the position of a New Zealand company upon registration: s. 27(3) Companies Act 1955.

155. In addition corporate status can be attained by unions registering under the provisions of the Incorporated Societies Act 1908. This Act has been infrequently utilized in the past by Trade Unions. The reader is asked to note this fact, but because of their numerical insignificance and for reasons that will emerge later in the paper, Trade Unions who attain corporate status by these means will be ignored. See generally White D. The Law Relating to Associations Registered Under the Incorporated Societies Act 1908 (Unpublished LL.M Thesis VUW, 1972).

RECAPITULATION

It is time to pause and take stock of the preceding jurisprudence. What has emerged is that groups of persons differ functionally from each other in terms of the legal relationships with which they involve or are able to involve themselves in. These legal relationships are determined by the bundle of rights, each category possesses e.g. to sue and be sued, borrow money etc. What the law does is to transform social policy into legal rules by an endless process of manipulating and permuting such possible legal elements, switching them on and off, aligning them in this direction or that. From this it finally becomes clear that at the stage before policy becomes law, there is an ideological struggle to

- recognize a group as fit to be abstracted into legal person, subject or object of a given bundle of rights;
- recognize a given place, thing, or activity in which a group is interested as fit to be abstracted into the material legal base of a legal relation;
- recognize an interest of a group as fit to be abstracted into the primary legal objective of a legal relation, consecrated as a right or protected by a duty.

The layering of legal relations refers to the fact that the State may superimpose legal relations on each other, so that the same area, the same interest, the same activity may be the focus of any number of overlapping legal relations. The complicating aspect is that often these legal relations are interwoven with, or even substituted by social fact, and at this level we enter the realm of judicial interpretation. So, on the implications of the quasi-corporation case law it would appear that if the following factual criteria were established, namely:

(1) Identifiability by collective name;

(2) The existence of some formal structure, e.g. paid staff;

(3) The association having an office;

(4) Continuation as an entity notwithstanding changes of membership (i.e., perpetual succession);

(5) Property held distinct from member. The fact that trustees are appointed to hold the property does not necessarily mean that they hold the property of the members (which they may do). There must be an intention to surrender the property to the entity;

then the courts have been persuaded to impart a certain quantum of legal status to create a creature akin to the universitas personarum of Roman-Dutch law. [156] This would

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156. See Bamford B. R. Bamford on the Law of Partnerships and Voluntary Associations in South Africa (2nd ed. Juta, Cape Town, 1971) Chapt. 20.

of course be routine if the enabling Act specifically conferred such powers but the courts have demonstrated a willingness to grapple with the enabling statute to try to prise loose, even tangential evidence of an "intention" to confer status for a particular purpose; and in this respect Willis is undoubtedly on the boundary that would involve creating judge-made corporations. Taken to its logical extreme, the Willis decision would be a striking evocation of Maine's dictum that

> "substance law has at first the look of being gradually secreted in the interstices of procedure." 157

Once a group is recognized as a legal unit for one purpose, there is a tendency to attach to it by a gradual process of "entification", many or all of the legal attributes of corporate personality which are consistent with the factual nature of the group.

That this may pass unnoticed may be due to what are perceived as "just" results obtained from judicial innovations. For example, in Bailey if the Federation was not held to be an employer the widow of a referee who died whilst "employed" by it would not have been eligible to compensation from the Workers Compensation Board. Such a result would have had the approval of Ford: [158]

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157. Ancient Law (Oxford University Press, London, 1959).

158. Unincorporated Non Profit Associations (Clarendon Press, Oxford, 1959) xxi.

> "To assert that what may be called 'legal entification' is not primarily predicated upon human personality does not involve denial of the preposition that law is primarily concerned with regulating the affairs of human beings. The selection of legal units which are not human beings is simply part of a technique whereby that end may be attained. Legal systems are theoretically free to ascribe significance as legal units to things or ideas as required."

Legal systems, Ford would maintain, includes the judiciary, and it is perhaps these sentiments which lay behind Mocatta J's reasoning in Knight and Searle v Dove (supra, page 78).

Nevertheless, the essential fact remains, either an entity is a corporation or it is not. The fact that various social entities have put pressure on the legal system to provide these special rules

> "indicates that a legal system cannot be neutral in regard to them: it must either prohibit them or accommodate them." 159

It can accommodate them by providing specific attributes, vehicles as it were toward policy ends. It means that, in legal theory, a corporation has a closer affinity with an unincorporated association than with a human individual.

Perhaps the courts have strayed too far into Parliament's domain. An unmistakable "Realist" flavour permeates the quasi-corporation case law. Lord Shaw in Osborne said that

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159. Ibid. 145.

> "[s]tatute did not set [trade unions] up, and speaking for myself I have some hesitation in so construing language of statutory recognition as a definition imposing such hard and fast restrictive limits as would cramp the developments and energies and destroy the natural movements of the living organism." 160

Implicit within this quotation is the belief that social organization and institutions are transitory and in the midst of change - if the State is tardy or non-reactive to this flux, then the judiciary can legitimately step in.

But even, as we look at the larger perspective, we would probably find that forms which seem to emerge are not completely new - they are merely refinements, both in size and nature of earlier group forms. As they evolve their desires for rights and duties necessarily changes - and these have right to be determined as a matter of policy. But as long as the primacy (sovereignty) of the Sate exists, it is for the State - those who frame the laws, to ultimately resolve these issues.

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160. Op cit., 107.

CHAPTER IV

THE SIGNIFICANCE OF CORPORATE STATUS

The unincorporated trade union is a fact. The trade union registered under the Trade Unions Act 1908 is a fact. And, a trade union registered under the Industrial Relations Act 1973 is also a fact. They all exist, and their existence modifies political, economic, and legal relationships in countless ways. One of the only comments we can make in advance is that the effect of these different legal statuses substantially depends on how they are perceived - both by those who frame the laws, and by those who are affected by them.

The problem of determining the significance of both facts of social behaviour and those of acts of law is at least as old as western philosophy itself. Broadly, traditional theory has it that social facts participate in two worlds, the natural or physical world of cause and effect and the mental world of ideas. Ideas have a peculiar characteristic in that they are non-observable - ideas about ideas are still ... ideas.

In contrast there has been a continuing tradition to the contrary that has evolved from many different directions:

from Kant and Hegel [161] and the idea of autonomy of mental structures, to Marx's concept of ideology [162]. Within this tradition, every perceived social or legal fact - for instance a trade union with a specific legal status - acts through a mental complex that rests as a superstructure on a real-world basis. In that mentalized form the social fact participates in the mental processes of the members of the trade union and it is through modification of the mental complex, among other means, that the real-world facts may be modified in their turn. Both these phenomenon interact with each other, but each is autonomous and exclusive. As between the power of the idea of the thing and the power of the thing itself, neither is necessarily the master of the other.

Positive law seems to fit uncomfortably within such a notion - it is separate from the real-world substratum that underlies it and from the mental complexes through which it is perceived. As a mental fact, it seems nevertheless not to have any actual thinking subject, whilst as a social fact it nevertheless seems to be abstracted from every actual and particular real-life situation, to be beyond the real.

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161. Kant and Hegel both considered that the process of thought is not merely a product of the world outside the mind. Either thought creates the world as we know it (Kant) or thought and the world are not essentially different (Hegel).

162. Marx K., Engels F. The German Ideology (Progress Publishers, Moscow, 1964).

And yet for all its disembodied objectivity, positive law is one of the most powerful manifestations of real-world forces and one of the most powerful determinants of social behaviour.

To grasp its significance is to examine the social fact not simply in terms of the empirical observer looking in from the outside nor from the view of the insider for whom participation in the social fact is part of his life. We have to combine these aspects and to do this we must assume that each social fact is surrounded by a richly interwoven contextual layer with interlocking relationships outside its own narrow form.

It is thus possible to view the legal status of a Trade Union as a specific phenomenon, the center of its own structure of significance. It happens to take the form of words in a statute book or the words of a judge. It is different from its meaning - for that we must look back to Chapter II. The important point is

> "that the form does not suppress the meaning, it only impoverishes it, it puts it at a distance, it holds it at one's disposal. One believes that the meaning is going to die, but it is a death with reprieve; the meaning loses its value but keeps its life...The meaning will be for the form like an instantaneous reserve of history, a tamed richness, which it is possible to call and dismiss in a sort of rapid alteration; the form must constantly be able to be rooted again in the meaning and to get there what nature it needs for its nutrient; above all, it must be able to hide there."163.

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163. Barthes R. "Myth Today" in Mythologies (Jonathon Cape, London, 1972) 118.

We must move through the surrounding fabric of significance of the fact - this necessarily meaning the legal/ideological framework from which it is situated, and then move out of the law to resituate it in the structural phenomena of the social context. It is in this way that the purpose and the effect of a phenomenon of law can be distilled.

As a preliminary to discussing the corporate status of trade unions within a New Zealand context, it is necessary both to achieve a historical perspective, as well as to outline the significance of the non-incorporated trade union, to briefly investigate the English context.

ENGLAND

In 1824 the repressive regime of the Combination Acts of 1799 and 1800 which made it a statutory crime for workmen to combine for industrial purposes was repealed. An Act[164] passed a year later permitted workmen to come together and agree as to wages and hours that would be acceptable to them. This meant that certain union conduct was no longer criminal. Other kinds of criminal behaviour, both statutory or under common law remained untouched. For instance this statute did not permit unions to use violence or threats, or to molest or to obstruct in any other way a person in order to attain their ends, such behaviour still remaining a crime.

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164. 6 Geo 4C 170.

One of the consequences was that trusts set up by trade unions for the holding of property were, subject to special rules applicable to "illegal trusts", not protected by law. Thus, it was not possible for a union to recover property stolen or damaged by a trustee of the property[165]. Similarly, it was not possible to launch a criminal prosecution against trustees who embezzled union moneys because at common law it was not possible for a joint owner to commit embezzlement.

Nevertheless, despite this hostile social, legislative and judicial climate the fledgling labour movement agitated for the right to combine in order to improve working conditions, and the result was an inquiry held by the Royal Commission on Trade Unions in 1867 [166] which led to the enactment of the Trade Union Act of 1871.

The Act, apart from the provisions dealt with, specifically made unenforceable agreements between members of trade unions as to how they were to be employed or how they were to transact business. Similarly unenforceable were agreements prescribing particular uses for union funds (e.g. payments of benefits to certain members), and agreements to pay a subscription or a penalty to a trade union. But as Sykes and

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165. Hornby v Close (1867) 2 Q.B. 153.

166. See Webb S. & B. History of Trade Unionism op cit. 247ff

Glasbeek [167] note,

> "what was once the shadow cast by restraint of trade rules had become a protective umbrella:"

the State had decriminalized certain conduct, property could be adequately protected, and at the same time the unions would not be forced to make themselves subject to rules which, in the future, could prove embarrassing to their financial, organizational, and ideological structure.

The greatest significance of the Act lay in the fact that such combinations of workmen created for the purpose of attaining industrial goals, were, by their very nature, in restraint of trade. As a general rule [168] restraint of trade was illegal unless it could be justified by the special circumstances of the case, primarily reasonableness in view of the interests of the public. Now, it seems at that time the climate of judicial opinion considered the very existence of a trade union as being of dubious value to a society, with its objects and agreement unlikely to be viewed as being in accordance with the public interest.

Such views were reflected by Sir William Erle, who had been a member of the 1867-1869 Royal Commission. He reflected the laissez-faire mood of the time when he wrote, in 1869:

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167. Labour Law in Australia (Butterworths, Sydney, 1972) 706.

168. Maxim Nordenfelt Guns Co. v Nordenfelt [1894] A.C. 536.

> "Every person has a right under the law as between himself and his fellow subject, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the co-relative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of this right by others." 169

The courts would not enforce either contractual provisions restricting an individual's freedom to trade or labour according to an absolute free choice or the agreements and trusts of associations, such as unions, which had rules or objects restricting individual freedom in this context. But Erle and others did not stop at that doctrine. More than mere non-enforceability of provisions in restraint of trade might be the concern of the law. The infringement of an individual's 'right' to dispose of his capital or labour as he chose constituted a wrong.

As a consequence, the protection given against criminal prosecution soon proved inadequate as it was held in R v Bunn[170] that the same conduct in restraint of trade protected by the Act could still give rise to criminal liability because it might involve wrongs such as inducing a breach of contract and a combination to do such a wrong was a criminal conspiracy. In addition the intentional interference or molestation of anyone's business was still a crime per se. So, to counter these weaknesses in the 1871 Act the Conspiracy and Protection

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169. Cited by Hawkins J. in Allen v Flood [1898] A.C. 1, 14.

170. (1872) 12 Cox 316.

of Property Act was passed in 1875 and this Act simply provided that the crime of conspiracy was not to apply to trade unions if the relevant conduct was engaged in during a trade dispute. It also defined circumstances in which watching and besetting was an excusable practice.

Nevertheless, trade unionists were still subject, as Quinn v Leathem [171] indicated, to the vague and amorphous tort of conspiracy. The restraint was made even more grave in the same year by holding that union funds were liable for torts committed in the course of disputes, [172] and by the holding that, it being a tort under Lumley v Gye [173] for even a single person to induce a breach of contract [174], it was a civil conspiracy for striking workmen to induce those who displaced them to break their contracts by joining in the strike. [175]

It was only after another Royal Commission and, more importantly, highly successful union support of Labour candidates at the 1906 election that the gap between legislative and judicial evaluations of the interests involved in industrial relations was narrowed.

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171. [1901] A.C. 495.

172. Taff Vale, op cit.

173. (1853) 2 E & B, 216.

174. S. Wales Miners Fed. v Glamorgan Coal Co. (1905) A.C. 238.

175. Denaby Collieries Co. v Yorks Miners Assoc. (1906) A.C., 384.

This was done by the Trade Disputes Act 1906 (U.K.) which extended legal protection in four major respects. First, it excluded acts done in contemplation and furtherance of trade disputes from civil conspiracy, up to the point when they would be actionable even if done by one person alone. [176] Second, it excluded acts done in contemplation or furtherance of a trade dispute from the liability for procuring a breach of contract. [177] Third, it forbad civil actions against trade unions for tortious acts alleged to have been committed by them or on their behalf. Fourth, it explicitly described and declared lawful, ordinary peaceful picketing. [178]

The 1906 Act declared

> "the right of industrial combatants to push their struggle to the limits of the justification of 'self interest'". [179]

War and economic depression occasioned major readjustments [180] but by 1946 the polity was re-established.

Julius Stone [181] could state as a truism that in 1906

> "once a fair balance in bargaining power between labour and capital was reached, there appeared in England a kind of consensus between them, hostile to legal intervention on either side."

They then appeared to shared a policy which Kahn-Freund has expressed in the paradoxical phrase "collective laissez-faire".

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176. S. 5(3).

177. S. 3.

178. See Delaney T.H. "Immunity in Tort and the Trade Disputes Act..." (1955) 18 M.L.R. 338.

179. Stone J. Social Dimensions of Law and Justice (Stanford University Press, Stanford, 1966) 409.

180. e.g. Trade Disputes and Trade Unions Act 1927 (U.K.).

This policy was to insist that the law should keep its hands off the process of industrial struggle between organized employers and organised workers.

So, despite elaborate machinery (e.g. "Whitney Councils") and elaborate codes of procedure, all the actors in the system have contrived together to keep them out of the domain of the ordinary law. English protective legislation in the industrial relations field has the appearance of being ancillary to the terms reached through collective bargaining, rather than as a foundation for some form of compulsory arbitration.

The peculiar status of English trade unions was a result of marrying economics with political power - potentially an explosive mixture. The trade union movement grew despite the law because they were power residuums enervated by the strength of combination. They were the apotheosis of the development of the "Pure Union". As Graveson [182] comments:

> "The creators of the trade union movement were far more conscious of economics than law, for economics describe (sic) a situation of fact, whereas law is only a means to an end."

The English trade union movement was sufficiently vigorous and powerful to oppose the imposition of corporate status prior to the 1871 Act; and this was no less the case when it overthrew its short lived, outside imposed, legal personality in 1974. Their desire to live outside the law has been met

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182. "The Status of Trade Unions" (1963) 7 Jo. S.P.T.L. (NS) 121, 125.

by a fierce resistance to bring them inside it. Ultimately the twilight status, or "quasi-corporateness" of the English trade union is the heterodoxical result of opposing tentions - apparently factually neither one nor the other. A situation which appeals to the unionists who can have some of the advantages of corporate status, while providing the State with similar machinery to exercise their will, if they so wish.

This notion of power, shaping the context of legal status has obviously pushed the English trade unions to the fringe of the law. It will be investigated more deeply when we analyze the New Zealand context.

NEW ZEALAND

The famous trilogy of cases concerning economic association - Mogal Steamship v McGregor [183], Quinn v Leathem[184], and Allen v Flood [185] gave the English trade unionsts an unequivocal feel for how the judiciary perceived the labour movement, undoubtedly contributing to their distinct distrust of legal institutions.

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183. (1880) 23 Q.B.D. 598.

184. [1901] A.C. 495.

185. [1898] A.C. 1.

The same philosophy imbued the neophytic New Zealand Labour movement which was beginning to establish itself along British lines. In 1889 it was represented by the Maritime Council; a combination of the key industrial unions of seamen, watersiders, miners and railwaymen. But in 1890, a fifty-six day confrontation with employers bodies, known as the Maritime Strike, ended in defeat for the unions. It meant that unionsm in New Zealand

> "stood revealed as a fragile house of cards, which collapsed even more suddenly than it had appeared." 186

Perhaps, somewhat fortuitously for the union movement this particular period in New Zealand history was one of great social reform, prompted by the Liberal Party's avowed aim of turning New Zealand into some sort of South Pacific utopia. Describing the period, Nash[187] commented:

> "The legislation of this period was to correct the manifest injustices of the laissez-faire system. Depression, discontent, and a growing labour force formed an economic background favourable to social legislation."

He added:

> "there has emerged side by side with a deep faith in the value of individual freedom an equally firm belief in the value of collective organization for the purpose of providing security for the individual as well as for the nation." 188

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186. Howells J.M., Woods N.S., Young F.L.J. (eds) Labour and Industrial Relations in New Zealand (Pitman, Carlton, 1974) 6.
187. New Zealand: A Working Democracy (Dent and Sons, Melbourne, 1943) 33.
188. Ibid, 227.

The unique environmental, social and ideological circumstances of the young colony made it ripe for experimentation in the industrial field. It was an experiment that the State, through the law, could instigate, observe and control. To again quote Nash: [189]

> "New Zealand's long tradition of State activity, the recognition that the community as a whole through its organised government must be collectively responsible for the welfare of its members, the emphasis that has always been given to individual rights and freedom - these facts have enabled necessary political and economic adjustment to be made smoothly and as the need has arisen."

The result was the Industrial Conciliation and Arbitration Act 1894 (hereafter referred to as "the 1894 Act"). It was passed explicitly to encourage the formation of industrial unions and associations and to facilitate the settlement of industrial disputes by conciliation and arbitration. [190]

The crux of the legislation however was compulsory arbitration. This involved a situation where

> "parties are in one form or another bound by a regulation which is not of their own choosing, a regulation of conditions of employment or a regulation of the machinery for settling disputes and for determining conditions of employment." 191

This subjection of the parties to regulation imposed from outside is compulsory in the sense that arbitration does not depend on the consent of both sides and that the award is binding on them, whether they accept it or reject it.

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189. Ibid. 32.

190. See the Long Title.

191. Kahn-Freund O. Labour and the Law (Stevens and Sons, London, 1972) 116.

As opposed to the Weimar Republic in Germany where the Minister of Labour was chief arbitrator, the award-making body was not an arm of the State, insofar as it coveted the ideal of neutrality between capital and labour. However the system was more than a mere procedural forum for the voluntary settling of disputes and the bargaining between parties - it was a means by which the State could force the parties to come together. Alfred Deakin, in introducing the first Australian federal Arbitration Bill in 1903 which was based entirely on the New Zealand legislation stated: [192]

> "We now substitute a new regime for the reign of violence by endowing the State - which itself possesses a strength greater than that of either or both of the contestants - with power to impose, within the limits of reason, justice and constitutional government, its deliberate will upon the parties to industrial disputes."

William Pember Reeves, the Fabian lawyer who almost single handedly framed and championed the 1894 Act made it clear that the arbitration system could work only through "responsible" organisations, emphasizing that the system was designed for the well-being of the nation as a whole, and not jsut that of the unions. He was wary that "nebulous clusters" and "mere shifting groups" [193] of employees by which he meant voluntary associations could not provide the desired effect. Clark [194] reiterates the point when he comments:

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192. C.P.D. 15: 2862.

193. Drummond J. The Life and Times of Richard John Seddon (Whitcombe and Tombs, Christchurch 1906) 240.

194. Labour Conditions in New Zealand (Govt. Print. Off. Washington, 1903) 1222.

> "...the law constituting that tribunal is based upon the assumptions of unionism, and its machinery can be set in action only by those organisations. Without them the Act itself becomes inoperative. Anything that justifies the Act justifies the existence of the unions and forms a valid argument for their encouragement. The Court is not empowered to deal with workers as individuals, and the very life of its jurisdiction depends upon the organization of employees. The whole scheme for the arbitration of industrial disputes set up in New Zealand must stand or fall with the form of unionism that it creates."

The premise being that if the Award system was to operate and be effectively binding amongst the actors in the system, bodies powerful and clearly defined would be needed to ensure enforceability.

But, this "new province" envisaged unions not only as a creation of the State, but as subordinated to the State, the public, and their own interests. Consider the following statement of the Australian Isaacs J. (as he then was) in a case concerning registered organizations of <u>both</u> employers and employees. Such an organization was

> "the creation of the Act and simply an incidental to its great purposes. It is permitted to come into existence for the very purpose, not of making the policy of the Statute under the Constitution more difficult of attainment, but of assisting to carry that policy into effect." 195

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195. <u>Aust. Commonwealth Shipping Board</u> v <u>Fed. Seamens Union of Australasia</u> (1925) 35 C.L.R., 475.

POWER AND AUTONOMY

Underlying the public duty of unions is the State's duty to ensure their existence. An Act to encourage the organization of unions was more than a socially desirable "experiment". By providing that registered unions became corporations the Act made the State responsible for their very existence, as Isaacs J. pointed out (supra). In other words, although behind the rhetoric of neutrality (or even hostility) towards particular unions, the State could not escape being "pro-union" at least in the formal sense. The State could not be neutral as to whether unions should exist, and be strong enough to represent effectively a large section of the workforce.

Nestled within this protective cocoon unions would grow into strong and viable organizations; strong enough to achieve their social purpose but also strong enough to disrupt the fragile New Zealand social system. Therein lay the dilemma. Kahn-Freund articulates in a modern context what would have been uppermost in the minds of politicians those ninety years ago: [196]

> "Psychological and sociological theory have conspired with the world shattering events of our time to teach us a lesson about the strength of irrational forces in the shaping of society and especially of political action, about the pursuit of power, the force of prejudice, irrational and discontented and craving for change and irrational satisfication with things as they are and resistance to change."

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196. Labour Relations: Heritage and Adjustment (Oxford University Press, Oxford, 1979) 22.

Even the Webbs wrote about the 'joy of the fight' as a 'relief from the monotony of manual labour' and about a temporary exchange of a 'position of active leadership' for one of 'passive obedience'. [197] The fear was of Trade Union POWER.

For Parsons "power" is a

> "generalized capacity to secure the performance of binding obligations by units in a system of collective organization when the obligations are legitimized with reference to their bearing on collective goals and where in case of recalcitrance there is a presumption of enforcement by negative situational sanctions" 198

Power is backed by complex organizations. It is dependent on the willingness of people to accept that others are able to make binding decisions on their own behalf, which is in turn founded on an actual capacity to achieve collective goals through central direction. Again, this capacity depends upon complex and effective organization.

To achieve their goals (and the passage of the Trade Disputes Act 1906 (U.K.) is an example), unions need some dynamic substratum to make their power effective. The irony lies in that the conciliation and arbitration system, would tend to create such power residuums that would, like Hobbes's "worms in the entrails of a natural won", gnaw away at the existing social order.

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197. Industrial Democracy (Longmans, London, 1902) 180.

198. "On the Concept of Political Power" in Sociological Theory and Modern Society (Free Press, New York, 1967) 308.

But order had to be maintained in the colony - Durkheim[199] has shown that under conditions of economic expansion, breeding rapid change and social dislocation societies tend towards deregulation, or, as he termed it, anomie.

The consequences of anomie in such a small colony had problems that were not only social or economic, but moral as well, in that dissident behaviour could be perceived as a threat to the normative system of society. In such situations, as Mizruchi[200] has pointed out, certain structures have to emerge to contain such "surpluses" of people as those numerous workers who were existing, unorganized and resentful after 1890. Mizruchi considered it immaterial if such structures, which include formal institutional arrangements emerged by design or by "spontaneous social processes". In fact, the question of legal entification, as a means of control is aided in this context, precisely because we have such stark contrasts as between law created (i.e. corporations) and law tolerated (i.e. voluntary associations) institutions.

As Lustig [201] summarizes:

> "Forced to acknowledge the inescapability of political power, it declined to set priorities for choice and to fashion new institutions, and instead fell back on a group model of competition. Forced to acknowledge human interdependence, it moved only so far as to admit the impersonal co-ordination of administrative relations."

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199. See (Spaulding J. and Simpson G. transl) Suicide: A Study in Sociology (Free Press, New York, 1951).

200. Regulating Society: Marginality and Social Control in Historical Perspective (Free Press, New York, 1983).

201 Corporate Liberalism (U. Cal. Press. Berkely, 1983) 257.

Corporate personality was not simply a procedural device to create and enable previously non-existent unions to develop; it was not simply a means by which the conciliation and arbitration system could efficiently operate. It was, it is suggested, primarily a means by which a mobile, young, potentially dissident section (a large section) of the populace could be channelled into a controlled situation.

The difference between corporations and humans is black and white: in the former case, they act as permitted by the law; in the latter case, they act unless forbidden by the law. What the law creates, it controls. But, like Count Frankenstein's monster, there is the danger that the new creation will turn on its creator, and eventually usurp it. There must be limitations built in to ensure that such a situation does not occur. Corporate personality both provides a reason, and the means for this in-built stultification to occur.

The essential strength of the process is that it is on-going - once established it can be bolstered, dismantled or otherwise modified as deemed necessary and expedient. But all changes emanate from the control fact of corporate personality. Let us now consider the aspects of the process.

(a) State Observation and Review

The imposition of corporate status for unions necessarily involves the keeping of a register. This is so all who have or wish to have dealings with a union may discover from the register particulars of the union's objects, constitution, rules, chief officers, and address of its headquarters. In addition, registration is a convenient means by which unions are able to prove their status.

The requirement of registration may well be seen as ancillary to incorporation rather than as possessing a special significance of its own. Alternatively the system of registration may be viewed less as an instrument by which legal status is conferred as a means of recognition that such separate identity has been achieved in practice. However, the common element is that the State must confer or recognize the separate identity.

The precise words the State functionary - the Registrar - has to interpret are whether there are existent unions to which members of an applicant union could "conveniently belong."[202] If the Registrar was to give a wide interpretation to these words, that is, if his discretion was always exercised,

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202. S. 168(2) Industrial Relations Act 1973.

against the applicant for registration, the effect would be to preserve indefinitely the grouping of trade unions established in the past. New developments in trade union organization would be nipped in the bud.

The main coercion to register is the realistic fact that unless there is perfect solidarity within the society, with no personality rivalry or factions a small group can break away and if they contain sufficient members to attain the Registrar's fiat [203] they can register as a union, and with it the whole gamut of blanket clauses, penal clauses to protect the union and so on are imposed on the whole society's total membership which may number thousands.

The corollary is that, since 1939, the Minster of Labour has been empowered to deregister unions [204] from under the Act and has been used in the past in times of political and industrial unrest to admonish recalcitrant unions. The Minister had used this power against the Auckland Carpenter's Union in 1949, several unions during the Waterfront Strike in 1951, the Seamen's Union in 1971, and the Wellington Boilermakers Union in 1977. [205]

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203. S. 163(3) ibid. Also see the Second Schedule to the Act.

204. S. 130 ibid.

205. Indeed, one is left with the impression that although the Act legitimizes a range of penalties, their chief value lies in their 'being' rather than their 'shooting' - Kahn-Freund O. Labour and the Law (Stevens and Sons, London, 1972) 81.

All assets of the deregistered union may be vested in the Public Trustee until a union is registered under the Act and the Minister may direct the assets to be held indefinitely until a new union is permitted to be registered.[206]

Registration is only approved if the proposed rules of the union are consonant with the Act's requirements. The 1894 Act contained a simple set of requirements for the internal government of organizations registered under it. To be eligible for registration "associations" were required to be covered by rules which provided for inter alia, the appointment of a committee of management, a chairman or president and a secretary, the powers, duties and removal of the committee and of the chairman or president and secretary; the control of the committee by meetings of members; the requirements governing admission to membership and resignation; the control of property, periodic audit of accounts and procedures for the disbursement of funds; and the keeping of a membership register.[207]

By section 10 of the 1894 Act the effect of registration was to render the industrial union, and all persons

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206. See ss. 131-134 Industrial Relations Act 1973.
207. S. 3 Industrial Conciliation and Arbitration Act 1894.

who may be members of any society or trade union registered as an industrial union at the time of registration, or who after such registration may become members of any society or trade union so registered, subject to the jurisdiction by this Act given to a Board and the Court respectively and liable to all the provisions of this Act, and all such persons shall be bound by the rules of the individual union during the continuance of their membership. That is "the rules of the registered union were indirectly incorporated into the juridical." [208]

Certain guarantees are accorded the members. For example, the Registrar can refuse to record an organizations rules if they were "in any way unreasonable or oppressive." [209] Failure of an organization to have its accounts audited or to disclose the true financial position of the organization are penalised. [210] The power to interpret and enforce the provisions of the Act is vested in the Arbitration Court. [211] This court in its many forms has had a considerable influence on the internal affairs of unions in the course of deciding many matters before them. The relationship is best expressed by Dunphy J. in the Australian case of Cameron v Aust. Workers Union. [212]

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208. Atkins L.H. Legal Theory and Industrial Conflict (Unpub. LL.M Thesis, VUW, 1975) 401.

209. S. 179(1) Industrial Relations Act 1973.

210. S. 48, ibid.

211. S. 47, ibid.

212. (1959) 2 F.L.R. 45, 69-70

> "It is clear that the legislature which gave union members the statutory right to govern themselves in their own organisations by their homemade rules, appointed the Court as the final authority to decide whether or not those rules imposed oppressive, unreasonable or unjust conditions on members."

And

> "...the legislature has made the decision of the Court paramount over the decision of the rule-making body no matter how democratically and representatively constituted".

Perhaps the most overtly intrusive area has been that of union elections. Successively, rank and file unionsts have been enabled to bring charges of impropriety in the conduct of elections to the point when union leaders could themselves ask the court to administer an election, even when there was no impropriety (or possibility of) charged. The State now involves itself in every level of an election - it prescribes:

1. How the leaders must be chosen (election rather than appointment).
2. The type of electoral system.
3. How members are to vote.
4. Detailed procedures for investigation and rectification of irregularities.[213]

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213. See ss 199-212, Industrial Relations Act 1973.

The apparent motives for such legislation, which has been taken many steps further with the provision for ballots on the behest of the Minister of Labour to gauge rank and file support for industrial stoppages, has ostensibly been to seek a "democratic" outcome. But such motives, as Dickenson [214] points out, are not so simple

> "In the regulation of national elections a government will not usually completely disregard its own interests, even if it eschews the coarser forms of gerrymander and manipulation."

That is, it is assumed that radical leadership, which ostensibly thrives on member apathy, would not be able to take root. Moreover, the rhetoric of aiming for "union democracy" could be powerfully used by the State to intervene more overtly in union affairs. [215]

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214. Democracy in Trade Unions (University of Queensland Press, St Lucia, 1982) 225.

215. A more recent example of this rhetoric is given by Andrew Schonfield, a member of the Donovan Commission:
"I start from the proposition that the deliberate abstention of the law from the activities of mighty subjects tends to diminish the liberty of the ordinary citizen and to place his welfare at risk. If organizations are powerful enough to act the bully then very special grounds are necessary to justify the decision not to subject their behaviour to legal rules. The legal rules need not be much brought into play in practice; if such organizations enforce their own systems of rules and these work in the public interest there will be little actual labour for the law to do. But the content of the rules and the way that they operate in particular cases must not be allowed to escape from close public surveillance."
- "Note of Reservation". Report of the Royal Commission on Trade Unions and Employers Associations 1965-68 (Cmnd 3623, H.M.S.O. 1968) 290.

An example is provided by Cameron [216]: In 1948 the Australian High Court proved reluctant to intervene in a dispute in the Australian Workers Union in 1948 when a left-wing faction alleged improper conduct of the union's affairs. On that occasion Latham C.J. referred to the union, which had been incorporated under the Federal Act for decades as 'a voluntary association'. [217] Cameron says:

> "It was not until the officials of the communist-dominated Federated Ironworkers Association began to emulate their right wing rivals that the courts saw the necessity to act." 218

The implications of court review inevitably means a projection of "legalism" into the internal administration of the union. The union, to be sure its decision will stand up review by the courts, must itself adopt the modes of thought and action characteristic of courts of law. It must formalize its standards of decision, emphasizing the outward act and its conformity to the legislation instead of looking to the essential meaning and consequences of the act itself, and the compatibility of that meaning with the basic objectives of the union. So, if a union wishes to expel a member it necessarily has to take account of the

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216. "Industrial Labour and Political Labour: the Experience of 1972-75" in Evans G., Reeves J., Malbon J. (eds) Labour Essays (Drummond, Richmond, 1981) 16.

217. Australian Workers Union v Bowen (1948) 77 C.L.R. 601, 608.

218. Op cit, at p. 20.

quasi-judicial content of its rules, and how a Court would view not only the unions interpretation of the rules, but all actions surrounding the expulsion decision. All this means inevitably some loss in the sense of commitment to the unions aim and some diversion of energy toward procedural matters.

(b) Company Law Analogies

The functions of unions were further limited to the purposes deemed necessary and useful to the State by the application of a device originally developed to deal with combinations of capital - the ultra vires doctrine. Students of company law would be well aware of the demise of this doctrine. Originally conceived as a means of protecting investors, creditors and the general public the case of Cotman v Brougham [219] where the Court reluctantly held that a clause stipulating that all of the company's multitudinous objects were to be read independently of one another effectively enables companies to have such widely drawn objects clauses as to render the effect of the doctrine nugatory. It was found that in spite of such wide drafting, levels of capital investment were not in any way affected.

Further judicial inroads rendered the doctrine all but useless, and finally it was statutorily abolished by the Companies Amendment Act (No.2) 1983, which inter alia gave companies, if they so chose, the powers of natural persons.

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219. [1918] A.C. 514.

Nevertheless, the doctrine was applied in the trade union area with vigour. The House of Lords applied it in the case of Amalgamated Society of Railway Servants v Osborne.[220] This case has been analysed earlier in the paper but, to repeat the reasoning, the court held that the definition of "trade unions" in the Trade Unions Act of 1871 and 1876 was an exhaustive and limiting definition; since the definition referred chiefly to industrial objects any activity outside industrial matters was ultra vires a trade union.

The Webbs, in an oft-quoted passage described the implications of the decision:[221]

> "Not political action alone, not municipal action alone, but any mark of general education of their members or others; the formation of a library; the establishment or management of "University Extension" or "Workers' Educational Association" classes; the subscription to circulating book-boxes; the provisions of public lectures; the establishment of scholarships at Ruskin College, Oxford or any other college - all of which things were at the time actually being done by trade unions - were all henceforth to be ultra vires and illegal."

As the quote indicates, prior to this decision, trade unions had been carrying out activities which were perfectly lawful if carried out by voluntary associations. The case decided however that they were not lawful for trade unions.

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220. Supra, footnote 122.

221. History of Trade Unionism, op cit, at p. 260.

The application of the ultra vires doctrine was made all the easier in the New Zealand context because of the similarities between companies and industrial unions with respect to registration and incorporation. In McDougall v Wellington Typographical I.U.W.[222] the incorporated industrial union was prevented from giving some of its funds to assist strikers in another industry on the grounds that the union had been formed for the purpose of furthering the interests of workers in the printing industry, not for aiding workers in other industries.

The doctrine has prevented a union from acting as a benefit society [223] for its members, and from affiliating with an association of unions having purposes extending beyond the industry covered by the union and beyond the definition of "industrial matters" [224]. Until legislation was enacted in 1936, [225] the Osborne case was the reason for the consistent refusal of the Registrar to register rules containing a political objects clause. Moreover, even the rules of a union have been interpreted strictly.

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222. (1913) 16 G.L.R. 309.

223. Ohinemuri Mines and Batteries Employees' I.U.W. v Registrar of Industrial Unions [1917] N.Z.L.R. 829.

224. Auckland Freezing Works etc I.U.W. v N.Z. Freezing Works I.A.W. [1951] N.Z.L.R. 341.

225. The descendant of which is the Political Disabilities Removal Act 1960. With respect to Welfare Funds see s. 176 Industrial Relations Act 1973.

The result is that:

> "The objects of a registered union must be limited to furthering the interests of their members in their status as workers in the industry covered." 226

It is doubtful whether Cotman v Brougham (supra) type clauses would evade the eye of the Registrar.

The restrictive judicial interpretation of the doctrine can also possibly explain the curious dropping from the incorporation provisions in 1954 of the words "for the purposes of the Act". Shortland J. in Progress Advertising Ltd v Licensed Victuallers I.U.W. [227] remarked on this omission, that the registration of a union constituted a body corporate without restriction as to the purposes for which it is in law a body corporate.

Of a similar Australian provision, Fullager J. held [228] that the words did no more than explain the reason for granting incorporation but did not limit the capacity of a registered union. This reasoning was criticised by Sykes and Glasbeek [229] who said that if correct, it would be theoretically possible that a union, once registered, could enter into binding agreements aimed at avoiding the operation of the Act, and without any interference from any State machinery.

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226. Roth M. Trade Unions in New Zealand; Past and Present (2ed, Reed, Wellington, 1973) 98 - emphasis added.

227. [1957] N.Z.L.R. 1207, 1209.

228. Williams v Hursey (1959) 103 C.L.R. 30, 52. The provision in question was the s. 146 Conciliation and Arbitration Act 1904 (Aust.) It has now been amended and follows the New Zealand form.

229. Op cit., 702-703.

Sykes and Glasbeek argued that the provision meant that a union would have legal personality insofar as its conduct would have been related to the arbitration and conciliation system. But then, this would have meant that a union was, in effect a double entity; a corporate body, yet simultaneously reverting back to its skeletal state as an unincorporated association. If such was the case then a union could have the best of both worlds: freedom to pursue any object it desired under its unincorporated ego, and possessed with procedural capabilities with its incorporated ego.

The role of unions within the conciliation and arbitration system is too far entrenched to permit of such an interpretation. Clearly even the ultra vires case law in the company law field does not permit a union to escape liability for criminal conduct.

It also impinges on the question of whether the liability of union members is limited, as it is in registered companies, or unlimited. Under the 1896 Act, if there was a breach of an award, a penalty not to exceed £500 in the case of any individual employer or trade union was to be exacted. Should a union's funds be insufficient, each member was liable to the extent of not more than £10.[230] Section 119(4) Commerce Act

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230. S. 22(1).

1975 is another example of a statutory lifting of the veil, where members of a union - which by that section includes any "union or association or body corporate"[231], thus contemplating unregistered unions - are jointly and generally liable for damages and costs awarded against their union that are unpaid after two months of judgment, up to a limit of $200 per member.

No case is directly on point. Shortland J. in the Progress Advertising case opined:

> "As a corporate body [an industrial union] possesses a legal entity, separate and distinct from its members. It is the property and assets of the corporate entity as distinct from the property and assets of its members which are liable on its contracts. The liability of its members is confined to subscriptions and levies fixed by its rules." 232

Dicta, however, in a couple of Australian cases, Burwood Cinema Ltd v Aust. Theatrical etc Assoc.[233] and Fed. Iron-workers v Cmmwlth [234] suggest that it is legitimate to go behind the registered organization and look at the membership in order to distinguish between a real and an illusory industrial dispute.

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231. S. 119A(1) Commerce Act 1975.

232. Op cit., at p. 1212.

233. (1925) 35 C.L.R. 528, 548-551.

234. (1951) 84 C.L.R. 265, 279.

Undoubtedly, in opportune circumstances the Court will be able to draw an analogy, as it has with the ultra vires doctrine, with the rule in Foss v Harbottle,[235] and the rule in Turquands [236] case. As Ryan wryly comments:

> "The bulk of the case law on the topic suggests that there has occurred some sort of polarisation whereby the company law rules which restrict union activity appear to have been applied readily while this cannot be said of those rule which facilitate union action." (237)

Though companies, as incarnations of capital, and unions, that of labour, are at opposite ends of the socio-economic spectrum, their juridical form admits of analogy. Company law is a well-developed branch of jurisprudence and thus provides an invaluable source to be tapped by the judiciary. As Mathieson [238] notes:

> "When a legal problem arises to which the statute and authoritative case law affords no guidance, a company law analogy may be fruitful or even compelling. If the Court applies a principle of company law by analogy, this lends respectability to what might otherwise seem to be naked judicial legislation."

Despite being of different species, both types of bodies are under the one "corporate" genus. Familiar doctrines in one area can therefore be legitimately used if the enabling Act's language so permits it, in another.

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235. (1843) 2 Hare 461.

236. (1856) 6 El. & Bl. 327.

237. "Law and Industrial Relations: The Influence of the Courts" (1971) 2 O.L.R. 298, 305.

238. Op cit., at p. 112.

(c) Size and Number of Unions

The 1894 Act provided that:

> "a society of any number of persons not being less than seven, residing within the colony, lawfully associated for the purpose of protecting or furthering the interests of employers or workmen in or in connection with any industry in the colony, and whether formed before or after this Act, may be registered as an industrial union..." 239

There was nothing to restrict the coverage of industrial unions geographically. Yet it was not till 1936 [240] that the Act was amended to specifically enable the registration of industrial unions covering the whole of New Zealand, or covering the North or South Islands, or covering more than one industrial district.

Until the 1936 amendment there was a strong presumption (though no specific prohibition) against multi-district unions. This presumption was buttressed by the following factors: A 1905 Amending Act provided that in the case of every trade union registered under the Trade Union Act and also registering under the Industrial Conciliation and Arbitration Act, every branch of that trade union would be a distinct industrial union; the provisions for a separate permanent Board of Conciliation for each industrial district; and when in 1903 the Court of Arbitration was given power to extend an award to another industrial district, it could only deem the extended area to be one district. In addition

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239. S. 3(1).

240. Industrial Conciliation and Arbitration Amendment Act 1936 ss. 5-9.

there was, what Woods [241] describes as the "perpetuating clause" - section 11 of the 1905 Amendment which provided that the Registrar of Industrial unions could refuse (subject to appeal) to register an industrial union if there was already an existent industrial union in the same locality or industrial district to which members might conveniently belong. In a colony not long emerged from the stage of fairly isolated settlements, unions of workers were predominantly local or district unions, so section 11 (which exists, more or less in today's legislation) encouraged and perpetuated small unions by ensuring a rival free existence. As Woods concludes:

> "In 1894 an Act to encourage the formation of industrial unions was inescapably an Act to encourage mainly the formation of small localised unions." 242

Conglomeration of union strength was inhibited in that the 1894 Act contained no provision for the amalgamation of unions and not until the amending Act of 1905 was such a possibility envisaged. The 1905 amendment provided for the amalgamation of industrial unions in the same industrial district and connected with the same industry. Not until the 1937 Industrial Conciliation and Arbitration Amendment Act did amalgamation beyond the confines of a single district become possible.

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241. "Law and Industrial Relations: The Influence of Parliament" (1971) 2 O.L.R. 262, 264-265.

242. Op cit, 265. The long title of the 1894 Act was dropped in the Industrial Conciliation and Arbitration Amendment Act 1900. Commenting on this the Hon. Mr Rigg said:
"The Act was originally an Act to encourage the formation of industrial unions and associations, and a careful reading of that Act will show that the main inducement given to form industrial associations was the power given them to elect the Court. That is now taken away, and there does not seem to be left in the law the same inducement as existed previously for the Formation of industrial associations." (N.Z.P.D. Vol. 1715 (1900), 22). The honorable member, it is submitted, somewhat lacked a grasp of the philosophy of conciliation and arbi-

The present procedure for amalgamation is contained in section 192 Industrial Relations Act 1973. The two methods by which an amalgamation can take place (either one union absorbing the other, or two unions merging members and funds to create a new entity) are hamstrung by procedure. Moreover, the Registrar must be satisfied that the majority of those in the amalgamating unions desire it. The proviso to section 192(6) gives the Registrar the discretion to accept that the amalgamation is desired by the union if a majority of valid votes cast in a ballot (where each member has sufficient notice) are in favour of it.

Although at first blush the Registrar appears to have few powers under the amalgamation provisions, he does have control prior to the process - that is in his role of registering rules that may or may not provide for such contingencies. Of course, the rules of the new amalgalm are also under his scrutiny.

The resulting ebb and flow, as new unions are formed, or amalgamate, and whilst defunct unions slip into oblivion, has led to the following pattern of union size:

| Year | 0-499 | 100-199 | 200-299 | 300-499 | 500-999 | 1000-1999 | 2000-2999 | 3000-4999 | 5000-9999 | 10000 and over | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1901 | 142(24.3) | 30(17) | 19(20.3) | 5(8.7) | 4(10.6) | 1(6.9) | 1(12.2) | - | - | - | 202 |
| 1911 | 182(13.5) | 53(13.8) | 26(11.4) | 23(16.0) | 14(17.4) | 8(16.9) | - | - | 1(11.0) | - | 307 |
| 1921 | 239(11.5) | 70(9.9) | 36(9.4) | 28(11.3) | 28(19.0) | 11(14.9) | 3(7.6) | 2(7.6) | 1(9.7) | - | 418 |
| 1931 | 239(11.1) | 58(8.8) | 31(8.4) | 30(12.4) | 29(22.8) | 14(2.05) | 3(7.4) | - | 1(8.6) | - | 405 |
| 1941 | 184(3.5) | 70(4.2) | 38(4.0) | 38(6.5) | 32(9.4) | 27(15.3) | 13(13.4) | 10(17.8) | 5(12.6) | 2(12.8) | 419 |
| 1951 | 165(2.9) | 69(3.7) | 44(3.8) | 38(5.4) | 39(10.0) | 28(14.5) | 11(10.0) | 11(15.8) | 7(14.8) | 3(19.1) | 415 |
| 1961 | 147(2.0) | 58(2.4) | 39(2.9) | 39(4.5) | 46(10.0) | 25(10.9) | 15(10.7) | 11(14.2) | 11(22.3) | 4(20.1) | 395 |
| 1971 | 127(1.3) | 39(1.4) | 29(1.9) | 37(3.8) | 39(7.0) | 29(11.0) | 13(8.1) | 13(12.8) | 14(25.4) | 6(27.3) | 346 |
| 1977 | 86(0.9) | 28(0.8) | 23(1.2) | 29(2.3) | 43(6.2) | 31( 9.3) | 16(7.9) | 12( 9.5) | 13(20.0) | 11(42.0) | 292 |
| 1979 | 78(0.7) | 26(0.7) | 24(1.1) | 23(1.7) | 41(5.3) | 34( 9.4) | 12(5.5) | 13(10.0) | 13(18.9) | 13(46.6) | 277 |
| 1981 | 70(0.6) | 25(0.6) | 20(0.9) | 22(1.6) | 40(5.5) | 32( 9.1) | 11(5.2) | 7( 4.7) | 16(21.7) | 15(54.6) | 258 |

(Bracketed figures represent % of total membership)

Source: New Zealand Official Year Books

In terms of size, in 1981 the registered unions ranged from the Engineers Union which has 51,400 members, down to 10 members. Average numbers of membership number 118 to 1901, 234 in 1921, 55 in 1941, 772 in 1951, 882 in 1961, in 1971, and in 1981. Quite clearly there is a trend towards bigger unions, and a corresponding dimunition in the number of unions. But one can still discern the small-scale nature of New Zealand trade unionism. Well-over a quarter of the registered unions in 1981 contain less than one hundred members, all told, over one half (137) have under 500 members. It is significant to note as a comparison, West Germany, which of course has a much larger workforce has only eighteen unions.

It seems, however, that quite apart from direct controls the conciliation and arbitration system itself, maintains control over union size. Examine Riches' [243] comment on the development of unionism during the period of abolition of compulsory arbitration (1932-1936):

> "There was little change in the total number of unions registered. Although the abolition of compulsory arbitration left the smaller unions virtually powerless and increased correspondingly the incentive to amalgamation, the proportion of total membership in the larger unions actually declined and the number of small unions remained practically constant. Where small unions had been long established a variety of factors combined to ensure their survival. Real differences of interest, personal factors and

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243. The Restoration of Compulsory Arbitration in New Zealand (1936) Int. Lab. Rev. 753, 761.

> a belief that compulsory arbitration would be restored as soon as a change of government occured, combined to delay the expected movement towards co-operation on a larger scale. In the long run, if the curtailment of the Court's powers had continued, the advantage of larger unions in free collective bargaining might have proved decisive, but up to the end of 1935 the situation remained substantially unchanged."

The conciliation and arbitration system may thus have in-built mechanisms to ensure that too many large unions do not emerge. A quick perusal at the amount and nature of demarcation disputes reported both in New Zealand and overseas, bears witness to the sharp ideological, social and economic differences between unions, which ultimately hinder their joining, even, as seen, in times of economic depression.

(d) Commitment

Any organization varies in the degree of commitment required of its members. Coser[244] has demonstrated in a study of "greedy institutions" how the Roman Catholic priesthood requires celibacy in order to remove any alternative potential for the priest's loyalty, thus tying him to the Church for life. Alternatively, an organization

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244. Greedy Institutions (Free Press, New York, 1974).

marked by undercommitment is apathetic, difficult to motivate, and malleable by those in power. This latter state can be achieved by the following means:

(i) Finance

The State ensures that unionists pay minimal fees, which apart from minimizing their financial commitment, also has the effect of keeping their union's poor. There was no legislative mention on the matter of union fees till 1922 when a one shilling per week limitation for the first month of membership was placed, after which the union could charge what it liked. At first sight this appears to be only a temporary fetter but as Woods [245] submits, the figure for the first month was a psychological barrier that few unions could break out of; the rank and file member inclining to the view "that if the law specifies an amount, it must be because that amount is regarded as enough."

In 1936, a ceiling of one shilling per week without time limit was imposed, though a higher rate could be imposed if the majority of votes cast in a meeting (given with seven days notice) so agreed. [246] In 1936 one shilling a week amounted to approximately 1.3% of the minimum adult male wage rate in unskilled occupations.

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245. Op cit, at p. 208.

246. S. 28(2) Industrial Conciliation and Arbitration Amendment Act 1936.

Section 182 of the Industrial Relations Act 1973 now provides a ceiling for weekly subscriptions of 1% of the minimum adult wage rate and repeats the tightening up of the procedure for above-the-ceiling rates by requiring an adoption by a majority of the valid votes cast at a secret ballot of financial members of the union, being either a postal ballot or a ballot approved by the registrar.

(ii) Compulsory Unionism

The introduction of compulsory unionism in 1936 [247] necessarily led to bigger unions but, ones that, as Rosenberg[248] describes, were the same as the small arbitration unions - "part of the arbitration machinery of the State but having little active existence outside it." To further illustrate his claim, Rosenberg compared the membership of all unions containing more than 3000 members as at 31.2.1949, with their numerical strength as at 31.12.1935. Whilst there are some methodological inadequacies in such a simplistic comparison (notably it does not take into account changing patterns of industrial development) it is significant to note that of the twenty four unions comprised in the 1949 figure, only three had membership of over 3000 members prior to compulsory unionism. Such unions were typified by the indifference of their membership.

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247. Ibid., s. 18.

248. Compulsory Arbitration; Barrier to Progress? (Modern Books, Wellington, 1952).

Compulsory unionism has gone through several incarnations in form though the unqualified preference clause retained compulsory unionism in substance. New sections 99-100 were substituted by the Industrial Relations Act Amendment 1983 and abolished unqualified preference clauses instituting a regime of voluntary unionism.

(iii) Ideological Cleavage

International experience demonstrates that unions can attain ends by supra-legal political means, either by creating some representational interest in political parties, or, by attempting to create a particular climate of opinion which will influence public opinion and State policy.

We have seen how the Osborne decision was accepted in New Zealand. That decision was overruled in England by the Trade Union Act 1913 (U.K.) which declared that a trade union might include in its rule book any lawful objects, including political objects, providing that its principal objects were those set out in the Trade Union Acts of 1871 and 1876. It was not until 1936 that the New Zealand Parliament enacted the Political Disabilities Removal Act which allowed the funds of any society to be applied in furtherance of political objects if a majority of the members so desired. The voting procedure was amended in 1948 to cover the total of those voting. In 1950 when the National Government was elected the voting procedures reverted back to those of 1936, but, upon Labour being elected in 1960, the procedures changed again to those of 1948. They have since remained unchanged. Obviously,

both parties were aware of where the union's sympathy would lie and ensured that they would maximise any benefit (or discourage donations in the case of National) by manipulating the voting procedures.

Since the Waterfront dispute of 1951 when the Labour Party was "neither for nor against" the strikers, union financial support for the Labour Party has never approached that of their English counterparts. Indeed, in the late 1970's there was a strong movement within the Labour Party ranks to formally dissociate the Party from the union movement. Nevertheless, the 1984 Labour Party victory was on part built upon a platform of co-operation with the unions.

Unions have thus had to rely on their own political muscle. Increasing militancy led to the passage of Part IV A of the Commerce Act 1975 which deals with "strikes and lockouts contrary to the public interest." Section 11B of the Act makes it an offence for anybody to take part in, or to incite or aid, a strike or lockout concerning a matter which is: (a) not an "industrial matter" (though this term is undefined in the Act) or (b) not a matter employers and workers or their respective unions do not have the power to settle. It is also an offence to take part in, or to incite or aid, a strike or lockout that is intended to coerce the New Zealand Government

other than in its capacity as an employer, either directly or by inflicting inconvenience, upon any section of the community.

Section 119C of the Act deals with failures to resume work where the public interest is affected. Although not formally defined "public interest" is effectively defined by the section. The section gives the Arbitration Court sweeping powers to order a resumption of work in the case of a strike or a lockout if it is satisfied that the economic well-being of an industry or New Zealand is threatened. Any order for resumption of work in such cases can be applied for by any Minister of the Crown, or any person (or his representative) who is directly affected by the strike or lockout.

A union is liable to a large fine upon summary conviction for advocating, suggesting or conniving with non-compliance with a resumption of work order by the Arbitration Court, or wilfully failing to inform any worker of such an order, or in any other way inciting, instigating, aiding or abetting a commission of an offence against the section. In addition, however, an individual union official is individually liable to a fine upon summary conviction if it can be proved he was responsible for committing any of the above mentioned acts.

Where a union is liable for damages under section 119B and has not paid the full amount within two months after

the date of judgment, each individual member of the union at the time of the strike is personally liable, up to $200, for the arrears.

Therefore, individuals cannot cloak themselves within the anonymity of the body and be immune from financial penalty.

That such legislation in fact exists may be seen as striking at the very fundamentals for which incorporation of the unions were sought. To quote W. P. Reeves:[250]

> "English trade union critics have seen danger in that part of the statute which makes trade unions, when registered as industrial unions, corporate bodies with the right to sue and be sued. They fear lest resolute and wealthy employers may harrass these unions by costly litigation in the ordinary law courts. But when strikes and lockouts are abolished the main reasons for such litigation cease to exist."

The Commerce Act may then be an admission of failure of the 1894 Act's philosophy. Nevertheless, it reaffirms the rhetoric that workers are free to think and so as they choose - but the unions cannot be used as vehicles for this freedom.

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250. State Experiments in Australia and New Zealand Vol. II (MacMillan, Melbourne, 1969) 170.

(e) Institutionalization

Legal entities, just like human individuals, are shaped and moulded by their environment. It has been said that if a Negro was brought up from birth in Buckingham Palace, by a very young age she/he would display the mannerisms, in speech and bearing of a member of the Royal family. At least, one would expect so, and it was an expectation of Reeves that registered unions would become "responsible" bodies in his scheme. For instance, by making the union the avenue for manifesting individual workers problems, it was anticipated that unions would not waste valuable time or effort by vetting complaints brought before them. The underlying notion is, that an unincorporated association maintains an informal, club-like atmosphere - where social activities are almost important as everyday logistics. It is thought that if a body is incorporated, with all the attendant consequences, a more professional, and hence "responsible" attitude will occur.

Some unions have disproved this premise. The Wellington Boilermakers union exists and functions quite satisfactorily as an unincorporated association. Other examples include pulp and paper workers, and chemical fertilizer workers. However, these are the exceptions rather than the rule.

Such unions are employed by only a very small number of employers, and the workers are especially cohesive - factors which assist in their survival. The majority of unions however, are not of these types.

The process grafts onto and accelerates the drive to bureaucratization of the post-union transformation phase that was depicted in Chapter II. Lester [251] describes it thus:

(1) With union development comes psychological ageing, and the greater the extent of a union's membership the greater the extent of ageing;

(2) central control within a union engulfs democracy at the local level;

(3) Union leaders become administrators and the result is a decrease in the differences between management's and the union's top officers;

(4) Unions lose their dynanism and their innovative tendencies as they succeed in their programmes;

(5) there is a decrease in the differences between white-collar and blue-collar unions and the areas of worker protest are reduced;

(6) differences between unions and other societal organizations decrease; and

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251. As Unions Mature (Princeton University Press, Princeton, 1958).

(7) conditions productive of militancy tend to decrease as union leaders assimilate into society, and the leaders act as moderating influences.

Perpetual succession, one of the cornerstones of a corporation is essential in this organizational evolution, not so much because the law ensures that a corporate body enures - one can look to the field of Partnership law to easily see that firms can exist in fact for perpetuity without formal incorporation. Rather, it deprives an organization of the paramount sense of urgency needed to ensure day to day administrative survival. For any organization, as for any organism, the goal or objective that has a natural pre-eminence is its own survival. Once a union is registered there is a routine aspect to its continuing in existence - the collection or deduction of subscriptions, the enrolment of new members, the holding of general meetings, and the designation of officers.

This drive to bureaucratization is aided by a process perhaps unforseen by the 1894 Act's creators. Although the Arbitration Court was provided as a backstop where conciliation proceedings failed to provide an agreement, in practice the conciliation proceedings were not taken seriously and the Court became the main vehicle for the settling of wages and

conditions. A ready accession to law - 'creeping legalism' - has meant that much of the union's resources are concentrated at the Arbitration Court level. Negotiations, rules, and other forms of union action have to be analysed, not so much for their social, economic or political implications, but rather for their legal consequences.

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The cumulative impact of the policy discussed in this chapter is to encourage the dissolution of the rule of law, at least insofar as that form of legality is defined by its commitment to the generality and autonomy of law. Obviously autonomy and generality are no more than ideals which our liberal ideology makes necessary to achieve, though probably impossible to fully achieve. What distinguishes this small area of New Zealand jurisprudence is primarily the turning away from these ideals. That such could happen at such an early point in the country's historical development indicates distinctive break in human belief and social order, from its traditional, liberal Anglo-Saxon antecedents.

The spearhead of the trend is the blurring both in organization and in the stylized consciousness of the individual, of the boundary between the State and society; between public and private. Unger [252] describes:

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252. Law in Modern Society (Free Press, New York, 1976) 201.

> "As the State reaches into society, society itself generates institutions that rival the State in their power and take on many attributes formerly associated with public bodies."

It is probably true that historically much of the earlier separation of government and society may have been more a matter of rhetoric than of reality. In pre-Industrial Revolution England, the State had regulated conditions of work. Indeed, until the publication of Adam Smith's Wealth of Nations in 1776, Stone [253] notes that

> "the matrix of rights and obligations was conceived as fixed by custom or legal regulation in the public interest, not by private individual bargaining. Rates, quality, prices and wages up to the eighteenth century were fixed and in principle enforced by or under public authority."

It was for this very reason that the Realist/Pluralist strands of thought developed. Couched within romantic liberal views such as those of Locke and Mill; preoccupied with an individualist ethos, in which the natural and inalienable right of a person to associate was reified as an essential prerequisite to ensure a democratic system of government; these intellectual movements attempted to project an ideal-type descriptive norm of the State - individual relationship.

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253. Op cit. 338.

The images people hold of their social and political situation are an integral part of those situations and the individual's social meaning. Thus, the form of organization, and the belief in its underlying ideology is essential for the State's purpose to cloak the control and transformations of power that simmered beneath the social perspex.

But a change in emphasis in forms of organization is only really important if it is accompanied by a transformation of belief. Although the occasional political rhetoric stylising industrial relations as the construct of the ruling classes and the State has been reiterated ad nauseum throughout labour history, the important fact that it remains rhetoric ensures the process of control enures. It permits the restructuring of society and its institutions, while maintaining the ideological facade of the neutrality of law.

# CHAPTER V

## THE ABSORBENT STATE

### GROUPS AND THE LAW

### (1) Private Organisations - Public Law

The measure of State control over groups within society, as posited in the previous Chapter has had the effect of breaking down the traditional separation of private and public law. The distinction between these two types of law was put by Kelsen [254] in this way:

> "On the commonest view it is a question of classifying legal relationships. Private law is a relation between equal subjects of the same legal standing. Public law is a relation between a superior and an inferior subject, between two subjects, that is, of whom one has legally a higher value. The typical public law relationship is that between State and subject. Private law relationships are characterized simply as legal relationships, as relationships of 'rights', in order to bring out the distinction between them and public law relationships, which are relationships of 'power' or 'sovereignty'. ...[T]he general distinction between public and private law has a tendency to merge into a distinction between...State and law."

Thus, our industrial and labour laws merge into a body of social law that is more applicable to the structure of private-public organizations than to official conduct or private transactions. But though this development undermines the conventional contrast between the two types of law,

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254. "The Pure Theory of Law" (1935) 51 L.Q.R. 517, 532.

it does not necessarily destroy the broader difference between the law of the State and the internal, privately determined regulations of private associations. Insofar as private law is laid down by the State, it too, is in this sense public.

Nevertheless, the interface is especially thin. There are few truly voluntary unincorporated associations in New Zealand. For administrative convenience most sporting clubs and other societies have tended to register and gain corporate status under the Incorporated Societies Act 1908. By so doing they are subject to the same State scrutiny of rules and behaviours, that have become familiar to us through this paper. Those that remain outside the purview, for example, Maori tribes [255] do so primarily because the law is unable to subsume the particular body under a definite legal form, and moreover there are no compelling reasons for the State to create such a form.

In actuality then, many voluntary unincorporated associations today no longer meet the criteria for being truly voluntary, to such a degree have they become professionalised and bureaucratised, or so much has their raison d'etre become one of responding to State needs. Such

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255. See Brooks B. "Legal Status of Private Associations in New Zealand" (1969) 4 N.Z. Recent Law, 119.

organizations no longer exist primarily to strengthen the voluntary aspects of democrary. 'Voluntary' organizations such as these are, in a sense, severed heads no longer related to a body. They are answerable not primarily to their membership, but to a paid professional staff or at least self-perpetuating boards of trustees. Organizations are legitimized in society by the social utility of their function rather than by their status as the representative organs of defined bodies of individuals.

This becomes a basis of intelligent social engineering where active, piecemeal interference with the working of society, each case interrelated, leads to an overall, coherent and evolving conception of what is happening to the society. It is as Clegg [256] has described, a "continuous process of concession and compromise." As new groups, with resources that can affect others and the State emerge, the State enmeshes them within its purview. It confers certain attributes (notably legal personality) even if it means being at the expense of other established groups, so long as these new organizations are controllable.

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256. "Pluralism in Industrial Relations" (1973) 23 Brit. Jo. Ind. Rels. 309. See also Etzioni A.: The Active Society (Free Press, New York, 1968).

(2) Group Autonomy and the Watchful State

Within this scheme of "organized individualism" [257] the formal agencies of the State are therefore mainly channels and facilities through which the community operates in terms of its composite interests and goals; but realistically, the State is composed of the foci of decision-making and the flow of communications between groups or individuals who are involved. The bulk of this State intervention results from function rather than structure and form. Obviously, to fully realize its potential, would require massive State resources. A mega-bureaucracy as created would tend to be self-defeating as ideologically aware people would become awake to the social reality.

In any case, most voluntary organizations, as they become formalized institutions simply do not require manipulation. As previously mentioned, the import of legislation into their structures tends to create conservative, quiescent bodies. Even those that may investigate radical ideologies, such as say a Philosophy Society, would, in common sense terms, pose little threat to socio-political stability. A radical political group, on the other hand, may.

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257. Lustig op cit. 246.

The real value to the State occurs in maintaining the image of autonomy. As Becker [258] puts it:

> "The extent to which we have maintained democratic institutions in our society is largely a result of the successful administration of group interests without losing sight of what they mean for the individual personality."

The State can thus go about its tasks when and if required, individual groups can go about theirs so long as they are consistent with the State's goals, "status quo" and "public interest" are thus inextricable in the majority of group contexts.

## TOWARDS A DEFINITION OF TRADE UNIONS IN LATE CAPITALIST SOCIETY

### (1) The Economic Background

Crises tend to cause the State to draw aside that veil of autonomy. The "late capitalist" phase that New Zealand has entered into, is typified by a crisis of economics. In the 1950's and 1960's New Zealand's economic situation was one of rosy prosperity. Economic growth paralleled that of developed market economies, and per capita G.D.P. consistently figured in the top ten in the world. Unemployment was virtually non existent.

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258. "Social Reality and Planning Illusions: Some Observations on the Need for a Legal Philosophy of Group Interests" (1959) 13 Rutgers L.J. 588.

However, from the late 1960's onwards, steadily worsening terms of trade and oil shocks (in the mid 1970's) contributed to an almost zero growth rate, record balance of payments deficits, with inflation and unemployment also soaring to intolerable levels. The influence of such economic factors on trade unions was described by the New Zealand Task Force on Economic and Social Planning in this way: [259]

> "Any country which has to pass through a phase of development which involves retrogression from levels previously achieved is bound to experience tensions as different groups struggle to hold their gains and defend the interests of their members....Trade unions are reactive as rapidly rising prices outdistance the restricted growth of wages."

The result was that the period after 1968 was characterized by the declining role of the conciliation and arbitration system as a mechanism for establishing wages and conditions of work, and in its general role as stabilizer of industrial relations. Since their rejection of the Arbitration Court following the Nil Wage Order of 1968, trade unions had increasingly assumed a more independent posture, becoming increasingly restive over the stratifications imposed by the industrial relations system.

The gradual decline in the significance of the conciliation and arbitration system meant a corresponding reduction in the State's capacity to direct events within the industrial relations system.

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259. New Zealand at the Turning Point (Wellington, 1976) 4.

(2) The Union and the Planning System

Trade unions are central to the pursuit of full employment policies. They have no reason, when making wage demands, to take any account of the effect on unemployment their wage demands may have caused. Until late capitalism, the role of unions as a means of economic planning were generally otiose. There have been few periods in New Zealand history when wage demands could not be related to the general economic performance.

However, certain large units are capable, by their bargaining strengths, to obtain what can be considered by the State, to be excessive wage demands. Because of the intricate system of wage parities this can filter through the onward system to create a wage spiral. The means by which this could be avoided, noted by Keynes nearly sixty years ago, was [260]

> "the recognition of semi-autonomous bodies within the State - bodies whose criterion of action within their own field is solely the public good as they understand it.... bodies which in the ordinary course of affairs are mainly autonomous within their prescribed limitations, but are subject in the last resort to the sovereignty of the democracy expressed through parliament."

Keynes was concerned to describe a system where organizations had their activities and relations co-ordinated and planned

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260. The End of Laisser Faire (London, 1926) 41-42.

rather than being determined by competition in the market or by conflict. Latterly, this system which has been called "corporatism"[261] has emphasized how the State through institutionalized frameworks regulates all aspects of the work relationship. The State does not just attempt to influence decisons, it prescribes or limits the range of choice open to corporate bodies. It is this directive - as opposed to supportive or facilitative activity which is crucial in the theory. The substantive character of State intervention is guided by four principles, which not only provide for the legitimation of the State's action but also clearly indicate why the State is likely, empirically, to be authoritarian if not coercive. These principles of unity, order, nationalism and success lay fundamental stress on the need for socio-economic co-operation rather than interest group competition in the effort that all must make in the 'national enterprise' of preserving society from economic ruin.

So, in response to the curtailment of their influence, in the period 1971-77 the State through incomes policies aimed at controlling the wage fixing process. There was

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26.1. For the meaning of "corporatism" see Winkler J.T., "Law, State and Economy" (1975) 2 Brit Jo. of Law and Society 103; Panitch L. "Models of Interest Intermediation and Models of Societal Change in Western Europe" (1977) 10 Compar. Pol. Studies 7. Unger R. Law in Modern Society, op cit 200-202.

a return to a general wage order system and freer bargaining after 1977 but this was abandoned in favour of a brief flirtation with selective intervention enshrined in the Remuneration Act 1979. This Act was passed because it was thought that previous State forays into altering awards, for example the Economic Stabilisation (Meat Processors' and Preservers Award) Regulations 1978, may have been ultra vires the enabling Act, the Economic Stabilization Act 1948. The 1979 Act was repealed in 1980 in return for the Federation of Labour agreeing to take part in tripartite wage talks, with State assurances of "reasonable" wage settlements and a hearing by the Arbitration Court for a general cost-of-living adjustment to wages.

Up to the present day tripartite wage talks have been tried and although initially successful with a 'wages accord' on 6 August 1980 have failed to achieve agreement on broader wage policy issues. In 1983 the Government enacted Wage and Price Freeze regulations which paralyzed the dispute of interest procedure and froze any increase in wages.

This directive philosophy is best encapsulated by the Hon. J. Bolger, who, when describing the operation of the Remuneration Act 1979 said: [262]

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262. N.Z.P.D.: 16 October 1979.

> "The Government would [spell] out the economic circumstances in the country from time to time... giving a general indication as to the scope of wage increases that are possible without further fuelling inflation."
>
> "In the absence of broad agreement on a sustainable level of settlement, the Government cannot abrogate its responsibility for the managing of the economy."
>
> "In the event that settlements are made that are in its view out of line with the sustainable level, the Government must intervene."

In other words, any factual autonomy in the wage bargaining area that unions may have possessed, as a residuary of the process of control outlined in the previous Chapter, is eroded by legal prohibition. The fact that wages are controlled is not important - wage controls have been used during wartime; and, in any case they may be temporary with free wage bargaining eventually restored. Its importance lies as within the general theme of this paper that what the State gives it can also take away. Thus, unions are given bargaining rights, and the ability to determine wages, within a conciliation and arbitration framework. But when they start bargaining outside that framework, or attain wage levels not conducive to the overall good of the economy, the State as arbiter of the public interest, can move in and take away such rights.[263]

Significantly, the judiciary, by a series of decisions in cases involving trade unions from the 1960's in England

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263. With flagrant disregard for traditions of Parliamentary democracy according to Black T. "Who will Arbitrate Now?" (1979) N.Z.L.J. 313.

and the early 1970's in New Zealand [264] began to reverse the right to strike and picket, thereby undermining previous juridical acceptance of such actions and hence the legal immunities granted to unions. This escalation in the legal coercion and control of trade unionism has been more comparable to the similar phase of the English judicial opposition to trade unions in the late nineteenth and early twentieth centuries.

Benediction is provided by bolstering the facade of the old principles of "freedom of association" that held sway in the United Kingdom courts and is given statutory form in voluntary unionism legislation. The act of faith is completed by fostering an ideology of "free but responsible" groups. The right to strike exists - but it is heavily circumscribed and cannot be used for political and non-employment related issues. Workers' unions are their own and not State created - unless you fall under the ambit of the Fishing Industry (Union Coverage) Act 1979 which permits only one, ministerially approved union in the Fishing industry to the exclusion of all others. Industrial relations was to be improved by co-operation and dialogue between the State, capital and labour, and to this end the Industrial Relations Council was established by the 1973 Act, for the representatives from the FOL and the New Zealand Employers

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264. See Wedderburn K.W. The Worker and the Law (2ed, Penguin, Hammondsworth, 1971) 324 - 84; O'Higgins R., Partington M. "Industrial Conflict: Judicial Attitudes" (1969) 13 M.L.R. 1; Northern Drivers Union v Kawau Island Ferries [1974] N.Z.L.R., 617; Harder v New Zealand Tramways Employees I.U.W. [1977] N.Z.L.R. 162.

Federation to:

(a) Consult together on matters of policy relating to industrial matters.

(b) Consider and make recommendations to the Government on the formulations and implementations of manpower policies.

(c) Formulate codes of practice relating to industrial relations.

(d) Recommend to Government on improving industrial relations, amending legislation.

- the Council discussed a wide range of issues, from absenteeism, Polynesian workers, to the Industrial Law Reform Bill (1977) before it broke down due to the State's lack of inclination to accept any erosion of its own decision making powers.

Such rhetoric enables the State to maintain the image of separateness from unions. Unions are depicted as scape-goats for the country's economic ills, and can thus distract public attention away from state economic ineptitude. Unions are then caught in a "catch-22" situation. Whilst not oblivious to the transmutation occurring, any frictional outbursts - such as the General strike in 1979 which was a pent-up reaction to Statist manipulation [265] is thus turned

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265. See Walsh P. , McMaster F. "Crisis and Confrontation - The Origins of the 1979 General Strike" (1980) 1 Industrial Relations Review, (No. 5) 33; (No. 6) 34;

around and used as justification for further and more obvious State control. In this respect it will be unlikely that the State will totally prohibit the right to strike. The "Kiwis Care" march in 1980 showed just how convincing "union-bashing" is to the public.

OUAGOS

1. Definition

Modern unions, as described, appear to be a genus of what have been termed "Quasi-autonomous-government organizations" or QUAGOS. Pifer described such creatures in this way:[266]

> "Lodged, through the normal process of legal incorporation, in the private sector of society, this new entity has in many respects the countenance of the private, non-profit enterprise and even some of the characteristics of the true voluntary association. Yet it is ...created as the result of legislation or other governmental initiative, and it serves important public purposes as an instrument of 'government by contract'."

The most commonly accepted examples of a QUAGO in a New Zealand context are the producer and marketing boards established under the Primary Products Marketing Act 1953. These boards are bodies corporate which:

(i) are constituted by statute and serve private enterprise;

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266. "The Quasi-Non-Governmental Organisation" in Hague D.C., McKenzie W.J.M., Barker A. Public Policy and Private Interests (MacMillan, London, 1975) 380.

(ii) finance for their operations comes from fees, levies on the industry and trading surpluses;

(iii) the majority of members on the controlling body represent producers;

(iv) are given the power to carry out their functions but the government may intervene on policy matters;

(v) possess monopoly power granted by the government.

To summarize attributes of these and other overseas QUAGOS it would be that they are legally incorporated as private institutions; they have trustees or a board of governors who govern it and are ultimately responsible for its affairs; its staff members are private employees; it theoretically determines its own programme though the enabling statute directs and restricts activities; and they are financially accountable to the Executive.

(2) Unions as QUAGOS

The thesis that unions are bodies more akin to QUAGOS than voluntary associations will be found difficult to accept by many. They will point to the fact that unions do not receive direct financial support from the State, that they do not provide tangible goods and services. Such

criticisms ignore the fact that the State financially supports the conciliation and arbitration system, mediation facilities and provides financial assistance for activities such as union elections.

In any case, what is more important is the motives for the perpetuation of the organization rather than by institutional form. The pure trade union exists primarily to serve the individual providing him with a means of expression and collective action outside the aegis of the State. In carrying out its mission, the incorporated trade union often does serve the needs of its individual members - simply see the unjustifiable dismissal and grievance procedures. But in the final test it must serve public purposes, and if these do not coincide with the individual's purposes, the State's interest must prevail. Power and responsibility are shared uneasily between the directorate of the union and the State. While in a showdown the union side could threaten to voluntarily deregister the union, the State, on the other hand, can use its legislative power to shape the union in a plethora of ways; from simply deregistering it, to creating, by legislative means, a new union. It can use its power and influence, in conjunction with employer bodies, to starve the union financially, or otherwise break its 'spirit'.

That is why unions are an "exogenous growth" within the social infrastructure. However much they have the appearance of the typical private voluntary organization, they will remain at bottom something essentially different. They are founded on the notion of 'maximum' feasible participation of the private citizen in their governance, but, when the test comes, 'maximum' must, of course, fall somewhere short of the absolute power possessed by the State.

The chimera of autonomy gives the State the appearance of sharing power - of consulting on desirable courses of action. It negates any requirements for public or political accountability - so crucial in Keynes's original formulation (supra). Decision-making power is delegated but the central decision-makers and managers pull the strings, frame the laws, and ultimately decide what happens and where.

## CONCLUSION

What we are witnessing is a splendid reification of the absolute sovereignty of the State. Throughout New Zealand's history there has been two ways of getting things done - by voluntary action or by direct State action. The dividing line between these two spheres has always been indistinct. But gradually, in response to powerful new forces especially the changing nature of the economy, the area of State responsibility has, perforce, greatly expanded.

Perhaps it is the inevitable historical tendency of all State structures to move towards totalitarianism, as has been argued by Diamond [267]: the State via the law cannibalises the very institutions that it apparently reinforces. But in this process of ingestion concepts such as that of the "trade union" retain their efficacy. In law, theory structures perception, and whatever is said of a concept reflects not so much what really happens as what we choose to see as having happened. Concepts have a tendency to displace reality, to set themselves up in its place. And they remain because those affected refuse to believe otherwise. Or are too afraid to believe.

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267. "The Rule of Law versus the Order of Custom" in Wolff R.(ed). The Rule of Law (Simon and Schuster, New York, 1971).

## CHAPTER VI

## THE CITY OF PIGS

### THE ADMINISTERED SOCIETY AND CONSCIOUSNESS

The jurisprudence analysed in this paper suggests that New Zealand society is increasingly becoming an administered society. The ascendance of what Follett described in the American corporate context as "group particularism" [268] has meant the creation of arrangements of hierarchy, privilege and dependence that, in fact, are more reminiscent of the structure of mediaeval society.

As Gierke [269] pointed out, genuine mediaeval thought started "from the Whole". But he also noted that its idea was of a composite whole - a body articulated into different ranks, professions, and estates rather than into arithmetically equal units.

> "The whole only lives and comes to light in the Members....Every Member is of value to the whole, and...even a justifiable amputation of a Member is always a regrettable operation." [270]

This is essentially similar to Talcott Parsons who maintained that the ultimate units of modern society were institutions composed of status role bundles. He made explicit the view

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268. In Smith P. (ed) The New State (Gloucester, Massachusetts, 1965).

269. Political Theories of the Middle Ages, op cit, 7.

270. Ibid. 27.

that the status-role is the property not of the individual but of the group.

This differentiated society is composed then of groups which perform different functions, but whose members are at the same time integrated through common ties of loyalty to the society and to each other as fellow citizens.

So, as recognized by Dicey [271] in 1898 and reiterated by Reeves, [272] Maine's theory that progressive societies have developed from status to contract [273] has been turned up on its head. Collective group agreements drawn out by trade unions within the collective bargaining arena defines the rights of a worker but, more importantly, catches him in a system that circumscribes both his mobility and his opportunities. [274]

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271. Lectures on the Relation Between Law and Public Opinion in England (2nd ed., MacMillan, London, 1962)

272. State Experiments Vol II, op cit.

273. Ancient Law, op cit. 141.

274. 1. The agreement has a time limit.
2. It has a previous body of minimum conditions, both legal and customary.
3. It is universalized so as to cover more than one person, more than any one group, shop, or factory.
4. It has objectives not immediately connected with the job, such as equalization of opportunities for union members.
5. It limits the rights and opportunities of others not embraced in the agreement.
6. It describes the expectancies for all members working in the shop and for all who will work in it.
7. It accepts the union as a going concern, and recognizes it as an agent of the workers, possessed of power to interfere in the industry.
8. It accepts the internal rules of the union as part of the contract.
9. It recognizes the "right" of the worker to his job.
10. It makes that right in some sense negotiable: displacement wage and retirement wage, depending upon the years employed.
11. It defines and universalizes privileges such as vacations with pay.

12. It regulates the future career of the individual within the industry by seniority.
13. It stratifies the relationships among individuals within the union as to pay, promotion, retirement.
14. It provides for "legal" redress through shop committees, arbitration, impartial chairmen.
15. It ties the wage contract to some outside standard, such as price changes, productivity, profits, higher standard of living.
16. It sets rules for admission into the industry: age, apprenticeship, membership in the union.
17. It staggers work during slack periods, and increasingly imposes other such limitations upon management.
18. It contains provisions for penalizing employer, employee, and the union.
19. It provides for an internal judiciary system.
20. It establishes an increasing body of rights that go with the job, not with the worker."

"These principles were implicit in the very first labor-management agreement. The specific items that creep into the agreements as they are renewed are a matter of precedent, convenience, and relative power. These rights and immunities are not interchangeable between one trade-union and another trade-union. Once a worker's lot is cast in one union and one industry, it becomes increasingly difficult for him either to alter his relative status in his own new "society", or to move from the union that had defined his role for him into another union where perchance he might discover a more congenial place for himself."
- Tannenbaum F. A Philosophy of Labour op cit. pp. 152-154.

Once a worker's lot is cast in one union and one industry, it becomes increasingly difficult for him either to alter his relative status in his own new "society" or to move from the union that has defined his role for him into another union where perchance he might discover a more congenial place for himself.

Membership of a union is thus an item of wealth - it is just like a share certificate representing a relationship to an organization.[275] However, unlike other forms of wealth, this item devolves from the State - it is a form of State largesse via the Trade Union body. The "franchise" dispersed to the union to participate in the conciliation and arbitration process and its existence at the largesse of the State gives the individual member a sense of solidarity with his fellows; a sense of security knowing his economic well-being is "safe" in the hands of a responsible body that had the fiatof the State. To be called a "union member" would not invoke fear of physical or legal reprisal against a worker

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275. "'Our forefathers', said the Emperor Sigismund in 1434, 'have not been fools. The crafts have been devised for this purpose that everbody by them should earn his daily bread, and nobody shall interfere with the craft of another. By this the world gets rid of its misery, and everyone may find his livelihood.' 'The first rule of justice', said the Parliament of Paris three hundred and fifty years later, 'is to preserve to every one what belongs to him: this rule consists not only in preserving the rights of property, but still more in preserving those belonging to the person which arise from the prerogative of birth and of position.' 'To give to all subjects indiscriminately,' argued on that occasion the eminent Advocate-General Seguier, 'the right to hold a store or to open a shop is to violate the property of those who form the incorporated crafts.'"
Webb S. and B. Industrial Democracy, op cit, 565-566.

rather it would to him, be an accurate reflection of what he is. The fact that he had certain skills would not assure him (until recently, though see later) of continued employment where a registered award was operating unless he was, or within two weeks of being asked would become, a member of the union. (Section 98 Industrial Relations Act 1973 - pre Amendment.)

But as Reich [276] describes them, they are a "substitute self". The State is empowered to confer and take away rights and duties and not the organization concerned. A union cannot refuse admission to a person unless he is of "bad character".[277] Similarly, modes of expulsion in the union rule book are subject to the Registrar's surveillance. [278] Until the 1983 amendments the Arbitration Court emphasized the unjustifiable dismissal procedures were within the prerogative of the union concerned and not the individual. [279] If the union considered a particular case and rejected a member's application, the alternative procedure could not be invoked. If the union failed to consider the facts, or was mala fides, only then could the individual member invoke the alternative procedure. But he would be faced with considerable expense with difficulties of proof and advocacy because the union could not be compelled to assist him. (Section 117 Industrial Relations Act 1973 - pre Amendment.)

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276. The Greening of America (Random House, New York, 1970) Chapt. 5.

277. S. 104 Industrial Relations Act 1973.

278. S. 177(1) ibid. permits the Registrar to require a union to amend its rules to bring them into conformity with matters to be provided for in s. 175, in this case paras. (i) - (k).

279. Hyland Z.R. v Rainbow Drycleaners Ltd (1982) A.C.J. 249.

Inevitably, the result is a change in the degree of independent sovereignty enjoyed by the individual, for there are conditions to be met for acquiring a status, maintaining it, advancing it, or avoiding its loss. The conditions are set by the State via the organization. And except as enacted in law, any conditions may be placed on status - the recent dicta in the JVII [280] case that " a good unionist will and should go along with the decisions of his union democratically made" contained not only a statement of ideological fact, but of functional necessity. Rewards are there for conformity. Opportunities to associate to overthrow such strictures are frustrated by the sheer knowledge that to lose one's status is tantamount to economic and social extinction.

The process is however more insidious than mere conformity to protects one's own interests. It conditions human behaviour. It has imbedded, over a period of ninety years, the belief that the union is the alpha and omega of industrial reality. A worker confronted with joining either a registered union or a rebellious splinter association would usually opt for the former because he knows that the law guarantees its existence; it can engage in activities that the other body cannot. It has the fiat of the State and so will continue long after the other has evaporated. Nobody beats the system. Reich has described this as "Consciousness

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280. (1982) A.C.J., 597, 606.

II", the ethos that laid the foundations for the corporate State. Its central aspects are

> "an acceptance of the priority of institutions, organizations, and society and a belief that the individual must be his destiny to something of this sort, larger than himself and subordinate his will to it."281

Private man becomes "public interest" man. If the law creates something, provides a person with a particular status, then there is a moral duty to fulfill that particular purpose. A union member is to act "responsibly" even though this may mean committing violence to his own beliefs and ideals.

> "[I]f his place in the corporate group calls for [speaking up in the interests of the group on matters which vitally affect its welfare], it is his obligation to speak up. He is only partially serving his function if he fails to perform this activity fairly, judiciously, and appropriately - if he fails to show how his group's functions and the objectives of society are interrelated." 282

A premium is placed on personal success to the extent that a particular organization's objectives will zealously be pursued. However, he realizes that he is enmeshed in an impersonal system which can at any time victimize him or impose its power on him. He is in favour of reforms, but he will not jeopardize his own status to fight for them.

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281 Reich, op cit, 67.

282. Blough R. M. Free Man and the Corporation (McGraw-Hill, New York, 1959, 106).

Toffler [283] wrote that the inevitable result of this process was to compartmentalize an individual's personality into modules - a separate identity for each social situation that an individual finds himself in. It is basely utilitarian in that the individual is not psychically capable of exhibiting his whole personality in every situation. Within a social paradigm he merely projects, and other actors within the paradigm lock into, a particular module. When a unionist is asked to vote on a ballot he is not wanting to reveal any notions of his personal problem, his loves, his sense of humour - solely to perform his function in the union/work module of his personality.

The Toffler thesis explains why ultimately a policy of voluntary unionism is functionally redundant. An individual may not want to join or to remain a member of the union simply as a rebellion against its coercive aspect; on principle; through sheer apathy; or simply to do something different. Every aspect of his personality is in harmony with the idea of "freedom of association" - except his worker identity. This module realizes that both material livelihood, and social well-being are contingent on becoming, or remaining "part of the union". To be sure the law may protect him from being coerced, physically or emotionally man-handled, being "sent to Coventry", if he does not join a union, but the worker knows the law can only go so far; that his life would become systematically intolerable.

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283. Future Shock (Bodley Head, London, 1971). See especially Chapter 6.

Again, the law protects his dismissal, victimization, or indirectly preference in employment due to not belonging to a union. He can bring proceedings before the Arbitration Court without the vehicle of a union. But how realistic is this? How can he afford the expenses, how can he collect vital information when it is obvious that union sources will conspire to ensure that he does not succeed in his quest? And how is he to have any chance to overcome this? The answer, to combine with any other like minded individuals. But, then he would run the risk of finding himself in the type of organization which he decided not to join or to leave, so what would appear to be the point?

LIFE, LOVE AND ORDER

Consider this statement from V. C. Clark, an American reporting on labour conditions in New Zealand and Australia. He had this to say about the New Zealand workman at the turn of the present century: [284]

> "Politically the New Zealand workman is much more aggressive than the American. His new-born social institutions pulsate with nascent energy and it requires his whole attention to direct them. His leaders claim that he is meantime losing the militant spirit of the English unionist. But he is becoming instructed in political affairs and is a firm believer in social experiments which have the intense interest to him of things just within the possibility of realization. Yet he is not a social dreamer. The leaders are practical and matter-of-fact enough in their discussions of proposed reforms to be secured through legislation..."

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284. Op cit., 1175.

with the following passage from an international Management Consultant's first impression of modern New Zealand workers":[285]

> "Nearly every large scale plant I have visited seems to be populated by people wandering around in a dream. They are rarely told anything by management about what they are supposed to be doing, and seem totally disinterested anyway. Additionally, there is this underlying feeling of hostility and ill humour which can surface in service situations as out-and-out rudeness. The climate of industrial relations underlines this with parties in most disputes seeming to adopt intransigent positions and both sides acting out stock caricatures."

New Zealand's great experiment in social and economic control is starting to ripen into successful fruition. It has created a work force reduced to animal contentment where a sense of incompletness and moral torpor reigns. In a brief passage of his Republic Plato evoked such a society, which he called the City of Pigs.

Unions usually do not form as posited in the "Pure Theory of Unions" nowadays. Workers may have friendships extending within their workplaces, but there is no longer the impetus for such primary groups to forge into a secondary organization. It almost always already exists. New work situations involve a process of registration (with a sufficient number of workers) first, and the formation of a group ideology second. The bureaucracy that develops provides the unionist's primary needs. As Drucker describes:

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285. Twinn W. The New Zealand Worker (1977) 2 N.Z.J.I.R. 97, 99.

> "The individual union member is like the individual stockholder; he neither wants to exercise his individual rights, nor would he know how to do it and for what purpose. Just as the stockholder buys a share in a modern big-business corporation because he thereby escapes the decisions and responsibilities of ownership, so the individual union member joins the union in order to escape decisions and to transfer the burden of responsibility to the union leader." 286

The modern unionist evades commitment. He refers all queries, complaints, and all other aspects of his work to his shop steward or job delegate. He sees little difference between the union bureaucracy and the bureaucratic organization who employs him. A bright young unionist who would have, in times past, been one of the leaders of the union movement can just as easily go to University or night classes at the Polytechnic, and in no time have a job as a management trainee or industrial engineer. In a few years he will have forgotten he ever was a union member. "He thinks like a manager, lives like a manager, behaves like a manager". [287] As Weber laments: [288]

> "It is as if...we were deliberately to secure men who need 'order' and nothing but order, who become nervous and cowardly if for one moment the order wavers, and helpless if they are torn away from their total incorporation in it. That the world should know no men but these: it is in such an evolution that we are already caught up, and the greatest question is therefore not how we can promote and hasten it, but what we can oppose to this machinery in order to keep a portion of mankind free from this supreme mastery of the bureaucratic way of life."

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286. The Future of Industrial Man (John Day, New York, 1924) 128.

287. Drucker P. Landmarks of Tomorrow (Harper Bros., New York, 1959) 102.

288. In Mayer J.P., Max Weber and German Politics (Faber and Faber, London, 1943) 77.

The real nightmare of 1984 comes not from Orwell's Big Brother watching over the individual to see that he believes right and thinks right, but is a world where no-one cares what you think or believe, except insofar as whether union dues were paid on time, your work is not encroaching into another union's jurisdiction. Above all, the regime crushes the spirit. It institutionalizes thinking to the point where radical or any non-statist thinking is seen as hopeless.

> "The impersonality of these constraints in industrial society leads to a great extent to a feeling of powerlessness. If the sole source of oppressive control is a totalitarian leader, one can attack him. If the source is an entire way of life, revolution is a less efficacious response. The idea that 'you can't beat the system' expresses the impotence of people against a rationalized and impersonal system of control." 289

And so the spiral continues. To break it one can only balk at the source of authority - the State. To question its legitimacy, or more practically, to persuade it to exercise its function in a way that more accurately typifies the ideals of democrary.

But all such "revolutions" start from the consciousness of the polity: the center of legal significance. A re-emphasis on the dignity of the individual and rights to

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289. Faunce W. R. Problems of Industrial Society (McGraw-Hill, New York, 1968) 70.

associate into groups, and with that group power to restructure society. Thus a brave new world.

But as employment increases, and the disparity between the rich and the poor increases, the State pushes its tentacles more firmly into the gaps. Those well educated and well-off are impervious, at least consciously, to the manipulation of their livelihood, by bureaucrats. They do not understand, and for the most part, do not care. White collar unionism may prove an exception as it exposes those on the fringe of the middle class to the control of state licensed unions. But as long as the "working man" is concerned with earning his wages to feed him and his family, abstract ideologies take a second place to the everyday struggle for survival.

## CONCLUDING REMARKS

This paper has proceeded at a level of considerable abstraction and generality because it has been concerned as much with illustrating an entire social situation as with particular groups. It has insisted on the complex textural interlayering of organization and consciousness, of the State and the individual, of law and human endeavour. The effort was to define a basic code of "meaning" at work in a particular legal situation.

It will be obvious that "meaning" does not entail merely interpreting the content of statutes; rather it is the relation between legal norms and social reality. It follows that the meaning of law, and hence its real effect could change over time while the content of statutes remained unaltered. As Kahn-Freund remarked:[290]

> "The appearance and disappearance of legal norms is a continuous process which takes place through and outside the corpus of written law. Society is working ceaselessly on the sum total of legal norms. It creates new norms,....It causes existing norms to disappear by refusing to apply them. It alters the content of existing legal rules though changes in 'interpretation'. The statement that the law is a product of the social relations of power must not only be understood in political terms. Social forces not only shape the law through political institutions, but also by their influence on judicial, administrative, and contractual practice, and by their involvement in the resolution of conflict."

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290. Quoted in Clark J. "Towards a Sociology of Labour Law" in Wedderburn K., Lewis R., Clark J. (Eds) Labour Law and Industrial Relations: Building on Kahn-Freund (Clarendon, Oxford, 1983) 93.

The root of change lies then within the consciousness of man. "Man is consciousness capable of intentionality"[291] wrote Unger, but he is also a member of the physical world. Though his intentions permeate some of the aspects of his situation, they never reach all of them. This is the achilles heel the State aims at - as argued they compartmentalize consciousness and force it into behaviourism. One can of course break free of such shackles, but when a society has such a predilection for these very shackles, and Siegfried[292] sensed this in New Zealand as far back as 1904, then the prospect of combatting the total absorption of groups into the State is limited.

If the thesis presented in this paper is correct then New Zealand society has an uncomfortable resemblance to some of the totalitarian regimes that we tend to vilify. Or, perhaps more correctly, it illustrates that the ordering of societies has world-wide common traits. In this case the differences between modern New Zealand and Nazi Germany, feudal England, and Soviet Russia are simply ones of degree and ideological illusion.

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291. Op cit., 256

292. "What distinguishes one country from another is the degree of resistance to power, either from individuals or companies or groupings and institutions. In New Zealand there is almost no resistance and, as a wave sweeps easily up a sandy beach, State influence makes itself felt, right up to the front door of private life."
- Democracy in New Zealand (Bell, London, 1914) 48.